United Nations

International Law Commission

Report on the work of its fifty-first session (3 May–23 July 1999)

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Official Records
Fifty-fourth Session
Supplement No. 10 (A/54/10)

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CHAPTER I

INTRODUCTION

1. The International Law Commission held its fifty-first session at its seat at the United Nations Office at Geneva, from 3 May to 23 July 1999.

A. Membership

2. The Commission consists of the following members:

Mr. Emmanuel Akwei Addo (Ghana)
Mr. Husain Al-Baharna (Bahrain)
Mr. Awn Al-Khasawneh (Jordan)
Mr. Joao Clemente Baena Soares (Brazil)
Mr. Ian Brownlie (United Kingdom)
Mr. Enrique J.A. Candioti (Argentina)
Mr. James Richard Crawford (Australia)
Mr. Christopher John Robert Dugard (South Africa)
Mr. Constantin P. Economides (Greece)
Mr. Nabil Elaraby (Egypt)
Mr. Giorgio Gaja (Italy)
Mr. Zdzislaw Galicki (Poland)
Mr. Raul Ilustre Goco (Philippines)
Mr. Gerhard Hafner (Austria)
Mr. Qizhi He (China)
Mr. Mauricio Herdocia Sacasa (Nicaragua)
Mr. Jorge E. Illueca (Panama)
Mr. Peter C.R. Kabatsi (Uganda)
Mr. Maurice Kamto (Cameroon)
Mr. James Lutabanzibwa Kateka (United Republic of Tanzania)
Mr. Mochtar Kusuma-Atmadja (Indonesia)
Mr. Igor Ivanovich Lukashuk (Russian Federation)
Mr. Teodor Viorel Melescanu (Romania)
Mr. Didier Opertti-Badan (Uruguay)
Mr. Guillaume Pambou-Tchivounda (Gabon)
Mr. Alain Pellet (France)
Mr. Pemmaraju Sreenivasa Rao (India)
Mr. Victor Rodríguez-Cedeño (Venezuela)
Mr. Robert Rosenstock (United States)

Mr. Bernardo Sepúlveda (Mexico)
Mr. Bruno Simma (Germany)
Mr. Doudou Thiam (Senegal)
Mr. Peter Tomka (Slovakia)
Mr. Chusei Yamada (Japan)

3. At its 2565th meeting, on 3 May 1999, the Commission elected Mr. Giorgio Gaja (Italy), Mr. Maurice Kamto (Cameroon) and Mr. Peter Tomka (Slovakia) to fill the three casual vacancies in the Commission caused by the election of Mr. Luigi Ferrari-Bravo to the European Court of Human Rights, of Mr. Mohammed Bennouna to the International Criminal Tribunal for the Former Yugoslavia, and of the appointment of Mr. Václav Mikulka as the Director of the Codification Division, Office of Legal Affairs of the United Nations.

B. Tribute to the memory of Mr. Doudou Thiam

4. At its 2598th meeting, on 7 July 1999, the Commission paid tribute to the memory of its member and former Chairman, Mr. Doudou Thiam, who passed away in Geneva on 6 July 1999. The Commission decided to dedicate its 2598th meeting to the commemoration of Mr. Doudou Thiam who had also served as Special Rapporteur on the topic "Draft Code of Crimes against the Peace and Security of Mankind".

C. Officers and the Enlarged Bureau

5. At its 2565th meeting, on 3 May 1999, the Commission elected the following officers:

Chairman: Mr. Zdzislaw Galicki
First Vice-Chairman: Mr. Raul Ilustre Goco
Second Vice-Chairman: Mr. Emmanuel Akwei Addo
Chairman of the Drafting Committee: Mr. Enrique J.A. Candioti
Rapporteur: Mr. Robert Rosenstock.

6. The Enlarged Bureau of the Commission was composed of the officers of the present session, the previous Chairmen of the Commission 1/ and the Special Rapporteurs. 2/

1/ Mr. J.C. Baena Soares, Mr. A. Pellet, Mr. P.S. Rao and Mr. D. Thiam.

2/ Mr. J.R. Crawford, Mr. A. Pellet, Mr. P.S. Rao and Mr. V. Rodríguez-Cedeño.

7. On the recommendation of the Enlarged Bureau, the Commission set up a Planning Group composed of the following members: Mr. R.I. Goco (Chairman), Mr. E.A. Addo, Mr. J.C. Baena Soares, Mr. C.P. Economides, Mr. N. Elaraby, Mr. G. Gaja, Mr. M. Herdocia Sacasa, Mr. J.E. Illueca, Mr. P.C.R. Kabatsi, Mr. M. Kamto, Mr. J.L. Kateka, Mr. M. Kusuma-Atmadja, Mr. T.V. Melescanu, Mr. A. Pellet, Mr. G. Pambou-Tchivounda, Mr. P.S. Rao, Mr. B. Simma and Mr. R. Rosenstock (ex officio).

D. Drafting Committee

8. The Commission established a Drafting Committee, composed of the following members for the topics indicated:

(a) Nationality in relation to the succession of States: Mr. E. Candioti (Chairman), Mr. Z. Galicki (Chairman of the Working Group), Mr. E.A. Addo, Mr. I. Brownlie, Mr. G. Hafner, Mr. M. Herdocia Sacasa, Mr. T.V. Melescanu, Mr. G. Pambou-Tchivounda and Mr. R. Rosenstock (ex officio).

(b) State responsibility: Mr. E. Candioti (Chairman), Mr. J. Crawford (Special Rapporteur), Mr. H. Al-Baharna, Mr. A. Al-Khasawneh, Mr. I. Brownlie, Mr. C.J.R. Dugard, Mr. C.P. Economides, Mr. G. Gaja, Mr. G. Hafner, Mr. Q. He, Mr. M. Herdocia Sacasa, Mr. I.I. Lukashuk, Mr. G. Pambou-Tchivounda, Mr. P.S. Rao, Mr. B. Simma, Mr. C. Yamada and Mr. R. Rosenstock (ex officio).

(c) Reservations to treaties: Mr. E. Candioti (Chairman), Mr. A. Pellet (Special Rapporteur), Mr. A. Al-Khasawneh, Mr. C.P. Economides, Mr. N. Elaraby, Mr. G. Gaja, Mr. M. Herdocia Sacasa, Mr. M. Kamto, Mr. T.V. Melescanu, Mr. B. Simma, Mr. P. Tomka and Mr. R. Rosenstock (ex officio).

9. The Drafting Committee held a total of 26 meetings on the three topics indicated above.

E. Working Groups

10. The Commission also established the following Working Groups composed of the members indicated:

(a) Nationality in relation to succession of States: Mr. Z. Galicki (Chairman), Mr. I. Brownlie, Mr. E. Candioti, Mr. C.P. Economides, Mr. G. Hafner, Mr. M. Herdocia Sacasa, Mr. P. Tomka and Mr. R. Rosenstock (ex officio).

(b) Jurisdictional immunities of States and their property: Mr. G. Hafner *(Chairman)*, *Mr. C. Yamada (Rapporteur)*, Mr. H. Al-*Baharna*, Mr. I. Brownlie, Mr. E. Candioti, Mr. J. Crawford, Mr. C.J.R. Dugard, Mr. N. Elaraby, Mr. G. Gaja, Mr. Q. He, Mr. M. Kamto, Mr. I.I. Lukashuk, Mr. T.V. Melescanu, Mr. P.S. Rao, Mr. B. Sepúlveda, Mr. P. Tomka and Mr. R. Rosenstock (ex officio).

(c) Unilateral acts of States: Mr. V. Rodríguez-Cedeño (Chairman, Special Rapporteur), Mr. H. Al-Baharna, Mr. J.C. Baena Soares, Mr. N. Elaraby, Mr. G. Gaja, Mr. G. Hafner, Mr. Q. He, Mr. P.C. Kabatsi, Mr. J.L. Kateka, Mr. I.I. Lukashuk, Mr. G. Pambou-Tchivounda, Mr. A. Pellet, Mr. P.S. Rao and Mr. R. Rosenstock (ex officio).

(d) Long-Term Programme of Work: Mr. I. Brownlie (Chairman), Mr. R.I. Goco, Mr. Q. He, Mr. M. Herdocia Sacasa, Mr. A. Pellet, Mr. B. Sepúlveda, Mr. B. Simma, Mr. C. Yamada and Mr. R. Rosenstock (ex officio).

F. Secretariat

11. Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel, represented the Secretary-General. Mr. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Mr. Manuel Rama-Montaldo, Deputy Director of the Codification Division, acted as Deputy Secretary to the Commission. Ms. Mahnoush H. Arsanjani, Senior Legal Officer, served as Senior Assistant Secretary to the Commission; Mr. George Korontzis, Legal Officer, and Mr. Renan Villacis and Mr. Arnold Pronto, Associate Legal Officers, served as Assistant Secretaries to the Commission.

G. Agenda

12. At its 2565th meeting, on 3 May 1999, the Commission adopted an agenda for its fifty-first session consisting of the following items:

1. Filling of casual vacancies
2. Organization of work of the session
3. State responsibility
4. International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)

5. **Reservations to treaties**
6. **Nationality in relation to the succession of States**
7. **Diplomatic protection**
8. **Unilateral acts of States**
9. **Jurisdictional immunities of States and their property**
10. **Programme, procedures and working methods of the Commission and its documentation**
11. **Cooperation with other bodies**
12. **Date and place of the fifty-second session**
13. **Other business.**

CHAPTER II

SUMMARY OF THE WORK OF THE COMMISSION AT ITS FIFTY-FIRST SESSION

13. Concerning the topic "Nationality in relation to the succession of States", the Commission had before it the Memorandum by the Secretariat. 3/ It decided to establish a Working Group to review the text adopted on first reading taking into account comments by Governments. On the basis of the report of the Chairman of the Working Group, 4/ the Commission decided to refer the draft preamble and a set of 26 draft articles on nationality of natural persons in relation to the succession of States to the Drafting Committee. Having considered the report of the Drafting Committee, the Commission adopted the draft preamble and the set of draft articles on second reading and decided to recommend to the General Assembly their adoption in the form of a declaration. It also decided to recommend to the General Assembly that the work of the Commission on the topic "Nationality in relation to the succession of States" be now considered concluded (chap. IV).

14. Regarding the topic "State responsibility", the Commission considered the second report of the Special Rapporteur which dealt with chapters III, IV and V of Part One of the draft articles. The Commission decided to refer the articles in chapters III, IV and V to the Drafting Committee, and subsequently took note of the report of the Drafting Committee (chap. V). Moreover, the Commission proceeded with a general debate on countermeasures on the basis of a chapter in the Special Rapporteur's second report.

15. With respect to the topic "Reservations to treaties", the Commission continued its consideration of the third report of the Special Rapporteur concerning the definition of reservations and interpretative declarations which it had not completed at the previous session due to lack of time, taking also into consideration the observations appearing in the Special Rapporteur's fourth report. The Commission adopted 20 draft guidelines pertaining to the first chapter of the Guide to practice. The Commission decided to restructure

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3/ A/CN.4/497.

4/ A/CN.4/L.572.

this first chapter which is divided in six sections concerning: (a) Definition of reservations (sect. 1); (b) Definition of interpretative declarations (sect. 2); (c) Distinction between reservations and interpretative declarations (sect. 3); (d) Unilateral statements other than reservations and interpretative declarations (sect. 4); (e) Unilateral statements in respect of bilateral treaties (sect. 5); and (f) Scope of definitions (sect. 6) (chap. VI).

16. With regard to the topic "Jurisdictional immunities of States and their property", the Commission established a Working Group on the topic and entrusted it with the task of preparing preliminary comments as requested by operative paragraph 2 of General Assembly resolution 53/98. The Commission took note of the report of the Working Group and decided to annex it to the present report. It also adopted the suggestions of the Working Group contained in its report and dealing with the following five areas: (1) Concept of State for purpose of immunity; (2) Criteria for determining the commercial character of a contract or transaction; (3) Concept of a State enterprise or other entity in relation to commercial transactions; (4) Contracts of employment; and (5) Measures of constraint against State property (chap. VII).

17. As regards the topic "Unilateral acts of States", the Commission examined the second report of the Special Rapporteur. The discussion centered mostly on the seven articles submitted by the Special Rapporteur dealing with the scope of the draft articles (art. 1), definition of unilateral acts (art. 2), capacity of the State for formulating unilateral acts (art. 3), representatives of a State for formulating unilateral acts (art. 4), subsequent confirmation of a unilateral act formulated without authorization (art. 5), expression of consent (art. 6) and invalidity of unilateral acts (art. 7). The Commission agreed to take as the basic focus for its study on the topic and, as a starting point for the gathering of State practice thereon, the following concept: "A unilateral statement by a State by which such State intends to produce legal effects in its relations to one or more States or international organizations and which is notified or otherwise made

known to the State or organization concerned." The Secretariat was requested to send a questionnaire to Governments inquiring about their practice and position concerning certain aspects of unilateral acts (chap. VIII).

18. With regard to the topic "International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)", the Commission considered the second report of the Special Rapporteur with respect to its future work on the topic. The Commission decided to defer consideration of the question of international liability, pending completion of the second reading of the draft articles on the prevention of transboundary damage from hazardous activities (chap. IX).

19. With respect to the topic of "Diplomatic protection", the Commission appointed Mr. Christopher J.R. Dugard Special Rapporteur for the topic.

20. Concerning the work programme of the Commission for the remainder of the quinquennium, the Commission took note of the report of the Planning Group in this regard and decided to update the programme set out at its forty-ninth session (chap. X, sect. A).

21. The Commission also took note of the interim report of the Working Group on the long-term programme of work and decided that the Working Group should continue its work at the next session (chap. X, sect. A).

22. In response to the request contained in paragraph 9 of General Assembly resolution 53/102, the Commission examined again the advantages and disadvantages of split sessions and endorsed the conclusions in this regard contained in the report of the Planning Group which considered this issue through a working group (chap. X, sect. A).

23. The Commission also decided, in response to the requests contained in paragraphs 10 and 12 of General Assembly resolution 53/102, to provide the General Assembly with updated information concerning procedures aimed at improving relations of the Commission with the Sixth Committee and cooperation of the Commission with scientific institutions, individual experts, international and national organizations concerned with questions of international law (chap. X, sect. A).

24. The Commission continued traditional exchanges of information with the International Court of Justice, the Asian-African Legal Consultative Committee, the Inter-American Juridical Committee and the Committee of Legal Advisers on Public International Law of the Council of Europe (chap. X, sect. B).

25. A training seminar was held with 23 participants of different nationalities (chap. X, sect. E).

26. The Commission confirmed its decision that its next session be held at the United Nations Office at Geneva, in two parts, from 1 May to 9 June and from 10 July to 18 August 2000 (chap. X, sect. C).

CHAPTER III

SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

27. In response to paragraph 11 of General Assembly resolution 53/102 of 8 December 1998, the Commission would like to indicate the following specific issues for each topic on which expression of views by Governments either in the Sixth Committee or in written form would be of particular interest in providing effective guidance for the Commission on its further work.

A. State responsibility

28. The Commission would particularly welcome, especially from these Governments which have not yet provided them, comments on the draft articles in Part Two, dealing in particular with (a) the definition of "injured State" (art. 40), and the legal consequences of that definition; (b) the articles dealing with cessation (art. 41) and reparation (arts. 42-46); (c) the articles dealing with countermeasures (arts. 47-50); and (d) whether the consequences of international crimes specified in articles 51 to 53 are (i) appropriate for that category, if it is to be retained; and (ii) equally appropriate for the category of obligations to the international community as a whole (erga omnes) and/or breaches of peremptory norms (jus cogens).

29. In addition, the Commission would appreciate comments from all Governments on the following suggestions which have been made:

(a) That a distinction should be drawn between a State and States specifically injured by an internationally wrongful act, and other States which have a legal interest in the performance of the relevant obligations;

(b) That the requirement of compensation (art. 44) should be spelled out in more detail, especially so far as concerns the obligation to pay interest;

(c) That the link between the taking of countermeasures and compulsory arbitration (art. 58 (2)) be avoided because it gives only one State (the State which has committed the internationally wrongful act) and not the other (the injured State) the right to initiate arbitration;

(d) That questions raised by the existence of a plurality of States involved in the breach of an international obligation or injured by an internationally wrongful act be dealt with in the framework of the draft articles.

B. Reservations to treaties

30. The Commission recalls that, in 1995, a questionnaire on the topic was sent to States and international organizations. The Commission, while thanking the States and organizations which have already answered, would like to reiterate its plea to those States and organizations which have not answered so far, to do so. Moreover, the Commission welcomes additional answers on the parts of the questionnaire which had not been covered by the States and organizations which answered, indicating that they would respond later on those parts.

C. Unilateral acts of States

31. The Commission would particularly welcome comments on the issues identified for inclusion in the questionnaire to be sent to Governments which are contained in paragraph 594 below.

D. International liability for injurious consequences arising out of acts non-prohibited by international law (prevention of transboundary damage from hazardous activities)

32. The Commission would like to draw attention to paragraphs 607 and 608 of chapter IX of its report and would welcome any comments that Governments may wish to make in that respect.

E. Protection of the environment

33. The Commission would welcome written comments by Governments and by relevant international organizations with respect to issues in the field of environment which they might consider to be the most suitable for further work by the Commission.

CHAPTER IV

NATIONALITY IN RELATION TO THE SUCCESSION OF STATES

A. Introduction

34. At its forty-fifth session (1993), the Commission decided to include in its agenda the topic entitled "State succession and its impact on the nationality of natural and legal persons". [5] The General Assembly endorsed the Commission's decision in paragraph 7 of resolution 48/31 of 9 December 1993, on the understanding that the final form to be given to the work on the topic was to be decided after the presentation of a preliminary study to the Assembly. At its forty-sixth session (1994), the Commission appointed Mr. Václav Mikulka Special Rapporteur for the topic. [6]

35. At its forty-seventh (1995) and forty-eighth (1996) sessions, the Commission considered the Special Rapporteur's first and second reports. [7] The Commission established at its forty-seventh session a Working Group entrusted with the mandate to identify issues arising out of the topic, categorize those issues which are closely related thereto, give guidance to the Commission as to which issues could be most profitably pursued given contemporary concerns and present the Commission with a calendar of action. [8] The Working Group completed its task as regards the preliminary study of the topic at the forty-eighth session.

36. At its forty-eighth session, the Commission recommended to the General Assembly that it take note of the completion of the preliminary study of the topic and request the Commission to undertake the substantive study of the topic entitled "Nationality in relation to the succession of States" in accordance with the proposed plan of action, which, *inter alia*, envisaged: (a) that consideration of the question of the nationality of natural persons would be separated from that of the nationality of legal persons and that

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[5] *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10* (A/48/10), para. 440.

[6] Ibid., *Forty-ninth Session, Supplement No. 10* (A/49/10), para. 383.

[7] Respectively documents A/CN.4/467 and A/CN.4/474 and Corr.1 and Corr.2 (Chinese only).

[8] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), para. 147.

priority would be given to the former; and (b) that the decision on how to proceed with respect to the question of the nationality of legal persons would be taken upon completion of the work on the nationality of natural persons and in the light of the comments that the General Assembly might invite States to submit to it on the practical problems raised by a succession of States in the field. 9/ The General Assembly endorsed the Commission's recommendations in paragraph 8 of its resolution 51/160 of 16 December 1996.

37. At its forty-ninth session (1997), the Commission considered the Special Rapporteur's third report, 10/ containing a set of draft articles with commentaries on the question of the nationality of natural persons in relation to the succession of States. At the same session, the Commission adopted on first reading a draft preamble and a set of 27 draft articles on nationality of natural persons in relation to the succession of States. 11/ The General Assembly, in paragraph 2 (a) of its resolution 52/156 of 15 December 1997, drew the attention of Governments to the importance of having their views on the draft articles and urged them to submit their comments and observations in writing by 1 October 1998.

38. At its fiftieth session (1998), the Commission reiterated its request to Governments for written comments and observations on the draft articles on nationality of natural persons in relation to the succession of States adopted on first reading in 1997, so as to enable it to begin the second reading of the draft articles at its fifty-first session.

39. At the same session the Commission had before it the Special Rapporteur's fourth report dealing with the question of the nationality of legal persons in relation to the succession of States. 12/ It also

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9/ Ibid., Fifty-first Session, Supplement No. 10 (A/51/10), para. 88.

10/ A/CN.4/480 and Corr.1 (French only) and Add.1 and Corr.1 and Corr.2 (French only).

11/ Official Records of the General Assembly, Fifty-second Session, Supplement No. 10 (A/52/10), chap. IV.C.

12/ A/CN.4/489.

established a Working Group to consider the question of the possible orientation to be given to the second part of the topic. 13/

B. Consideration of the topic at the present session

40. At the present session, the Commission had before it the Memorandum by the Secretariat (A/CN.4/497) containing an overview of the comments and observations of Governments, made either orally in the Sixth Committee or in writing.

41. At its 2566th meeting, on 4 May, the Commission decided to re-establish the Working Group on "Nationality in relation to the succession of States". The Working Group held five meetings, from 4 to 11 May. The Commission considered the Report of the Chairman of the Working Group (A/CN.4/L.572) at its 2572nd meeting, on 14 May, and referred the draft preamble and a set of 26 draft articles (hereinafter "draft articles on nationality of natural persons in relation to the succession of States") to the Drafting Committee.

42. The Commission considered the report of the Drafting Committee (A/CN.4/L.573, Corr.1 (English only) and Corr.2 (French only)) at its 2579th and 2580th meetings and adopted the final text of the draft articles on nationality of natural persons in relation to the succession of States.

43. At its 2603rd to 2606th meetings, from 15 to 19 July 1999, the Commission adopted the commentaries to the aforementioned draft articles.

C. Recommendations of the Commission

44. The Commission decided to recommend to the General Assembly the adoption, in the form of a declaration, of the draft articles on nationality of natural persons in relation to the succession of States.

45. Recalling the conclusion of the Working Group that "In the absence of positive comments from States, the Commission would have to conclude that States are not interested in the study of the second part of the topic",14/ and taking into account that no such comments have been submitted by States, the Commission decided to recommend to the General Assembly that, with the adoption of the draft articles on nationality of natural persons in relation

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13/ For the consideration of this part of the topic see paras. 456 to 468 of the Report of the Commission on the work of its fiftieth session (A/53/10).

14/ Ibid., para. 467.

to the succession of States, the work of the Commission on the topic "Nationality in relation to the succession of States" be considered concluded.

D. Tribute to the Special Rapporteur, Mr. Václav Mikulka, and to the Chairman of the Working Group, Mr. Zdzislaw Galicki

46. At its 2607th meeting, on 20 July 1999, the Commission, after adopting the text of the draft articles on nationality of natural persons in relation to the succession of States, adopted the following resolution by acclamation:

> **"The International Law Commission,**
>
> **Having adopted the draft articles on nationality of natural persons in relation to the succession of States,**
>
> **Expresses to the Special Rapporteur, Mr. Václav Mikulka, and to the Chairman of the Working Group, Mr. Zdzislaw Galicki, its deep appreciation and warm congratulations for the outstanding contribution they have made to the preparation of the draft articles through their tireless efforts and devoted work, and for the results achieved in the elaboration of the draft articles on nationality of natural persons in relation to the succession of States."**

E. Text of the draft articles on nationality of natural persons in relation to the succession of States adopted on second reading

1. Text of the draft articles

47. The texts of the draft articles adopted by the Commission at its fifty-first session are reproduced below:

DRAFT ARTICLES ON NATIONALITY OF NATURAL PERSONS IN RELATION TO THE SUCCESSION OF STATES

PREAMBLE

The General Assembly,

Considering that problems of nationality arising from succession of States concern the international community,

Emphasizing that nationality is essentially governed by internal law within the limits set by international law,

Recognizing that in matters concerning nationality, due account should be taken both of the legitimate interests of States and those of individuals,

Recalling that the Universal Declaration of Human Rights of 1948 proclaimed the right of every person to a nationality,

Recalling also that the International Covenant on Civil and Political Rights of 1966 and the Convention on the Rights of the Child of 1989 recognize the right of every child to acquire a nationality,

Emphasizing that the human rights and fundamental freedoms of persons whose nationality may be affected by a succession of States must be fully respected,

Bearing in mind the provisions of the Convention on the Reduction of Statelessness of 1961, the Vienna Convention on Succession of States in Respect of Treaties of 1978 and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983,

Convinced of the need for the codification and progressive development of the rules of international law concerning nationality in relation to the succession of States as a means for ensuring greater juridical security for States and for individuals,

Declares the following:

PART I. GENERAL PROVISIONS

Article 1

Right to a nationality

Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned, in accordance with the present draft articles.

Article 2

Use of terms

For the purposes of the present draft articles:

(a) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(b) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(d) "State concerned" means the predecessor State or the successor State, as the case may be;

(e) "third State" means any State other than the predecessor State or the successor State;

(f) "person concerned" means every individual who, on the date of the succession of States, had the nationality of the predecessor State and whose nationality may be affected by such succession;

(g) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates.

Article 3

Cases of succession of States covered by the present draft articles

The present draft articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.

Article 4

Prevention of statelessness

States concerned shall take all appropriate measures to prevent persons who, on the date of the succession of States, had the nationality of the predecessor State from becoming stateless as a result of such succession.

Article 5

Presumption of nationality

Subject to the provisions of the present draft articles, persons concerned having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor State on the date of such succession.

Article 6

Legislation on nationality and other connected issues

Each State concerned should, without undue delay, enact legislation on nationality and other connected issues arising in relation to the succession of States consistent with the provisions of the present draft articles. It should take all appropriate measures to ensure that persons concerned will be apprised, within a reasonable time period, of the effect of its legislation on their nationality, of any choices they may have thereunder, as well as of the consequences that the exercise of such choices will have on their status.

Article 7

Effective date

The attribution of nationality in relation to the succession of States, as well as the acquisition of nationality following the exercise of an option, shall take effect on the date of such succession, if persons concerned would otherwise be stateless during the period between the date of the succession of States and such attribution or acquisition of nationality.

Article 8

Persons concerned having their habitual residence in another State

1. A successor State does not have the obligation to attribute its nationality to persons concerned if they have their habitual residence in another State and also have the nationality of that or any other State.

2. A successor State shall not attribute its nationality to persons concerned who have their habitual residence in another State against the will of the persons concerned unless they would otherwise become stateless.

Article 9

Renunciation of the nationality of another State as a condition for attribution of nationality

When a person concerned who is qualified to acquire the nationality of a successor State has the nationality of another State concerned, the former State may make the attribution of its nationality dependent on the renunciation by such person of the nationality of the latter State. However, such requirement shall not be applied in a manner which would result in rendering the person concerned stateless, even if only temporarily.

Article 10

Loss of nationality upon the voluntary acquisition of the nationality of another State

1. A predecessor State may provide that persons concerned who, in relation to the succession of States, voluntarily acquire the nationality of a successor State shall lose its nationality.

2. A successor State may provide that persons concerned who, in relation to the succession of States, voluntarily acquire the nationality of another successor State or, as the case may be, retain the nationality of the predecessor State shall lose its nationality acquired in relation to such succession.

Article 11

Respect for the will of persons concerned

1. States concerned shall give consideration to the will of persons concerned whenever those persons are qualified to acquire the nationality of two or more States concerned.

2. Each State concerned shall grant a right to opt for its nationality to persons concerned who have appropriate connection with that State if those persons would otherwise become stateless as a result of the succession of States.

3. When persons entitled to the right of option have exercised such right, the State whose nationality they have opted for shall attribute its nationality to such persons.

4. When persons entitled to the right of option have exercised such right, the State whose nationality they have renounced shall withdraw its nationality from such persons, unless they would thereby become stateless.

5. States concerned should provide a reasonable time limit for the exercise of the right of option.

Article 12

Unity of a family

Where the acquisition or loss of nationality in relation to the succession of States would impair the unity of a family, States concerned shall take all appropriate measures to allow that family to remain together or to be reunited.

Article 13

Child born after the succession of States

A child of a person concerned, born after the date of the succession of States, who has not acquired any nationality, has the right to the nationality of the State concerned on whose territory that child was born.

Article 14

Status of habitual residents

1. The status of persons concerned as habitual residents shall not be affected by the succession of States.

2. A State concerned shall take all necessary measures to allow persons concerned who, because of events connected with the succession of States, were forced to leave their habitual residence on its territory to return thereto.

Article 15

Non-discrimination

States concerned shall not deny persons concerned the right to retain or acquire a nationality or the right of option upon the succession of States by discriminating on any ground.

Article 16

Prohibition of arbitrary decisions concerning nationality issues

Persons concerned shall not be arbitrarily deprived of the nationality of the predecessor State, or arbitrarily denied the right to acquire the nationality of the successor State or any right of option, to which they are entitled in relation to the succession of States.

Article 17

Procedures relating to nationality issues

Applications relating to the acquisition, retention or renunciation of nationality or to the exercise of the right of option, in relation to the succession of States, shall be processed without undue delay. Relevant decisions shall be issued in writing and shall be open to effective administrative or judicial review.

Article 18

Exchange of information, consultation and negotiation

1. States concerned shall exchange information and consult in order to identify any detrimental effects on persons concerned with respect to their nationality and other connected issues regarding their status as a result of the succession of States.

2. States concerned shall, when necessary, seek a solution to eliminate or mitigate such detrimental effects by negotiation and, as appropriate, through agreement.

Article 19

Other States

1. Nothing in the present draft articles requires States to treat persons concerned having no effective link with a State concerned as nationals of that State, unless this would result in treating those persons as if they were stateless.

2. Nothing in the present draft articles precludes States from treating persons concerned, who have become stateless as a result of the succession of States, as nationals of the State concerned whose nationality they would be entitled to acquire or retain, if such treatment is beneficial to those persons.

PART II. PROVISIONS RELATING TO SPECIFIC CATEGORIES OF SUCCESSION OF STATES

SECTION 1

TRANSFER OF PART OF THE TERRITORY

Article 20

Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State

When part of the territory of a State is transferred by that State to another State, the successor State shall attribute its nationality to the persons concerned who have their habitual residence in the transferred territory and the predecessor State shall withdraw its nationality from such persons, unless otherwise indicated by the exercise of the right of option which such persons shall be granted. The predecessor State shall not, however, withdraw its nationality before such persons acquire the nationality of the successor State.

SECTION 2

UNIFICATION OF STATES

Article 21

Attribution of the nationality of the successor State

Subject to the provisions of article 8, when two or more States unite and so form one successor State, irrespective of whether the successor State is a new State or whether its personality is identical to that of one of the States which have united, the successor State shall attribute its nationality to all persons who, on the date of the succession of States, had the nationality of a predecessor State.

SECTION 3

DISSOLUTION OF A STATE

Article 22

Attribution of the nationality of the successor States

When a State dissolves and ceases to exist and the various parts of the territory of the predecessor State form two or more successor States, each successor State shall, unless otherwise indicated by the exercise of a right of option, attribute its nationality to:

(a) persons concerned having their habitual residence in its territory; and

(b) subject to the provisions of article 8:

- **(i) persons concerned not covered by subparagraph (a) having an appropriate legal connection with a constituent unit of the predecessor State that has become part of that successor State;**
- **(ii) persons concerned not entitled to a nationality of any State concerned under subparagraphs (a) and (b) (i) having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last habitual residence in what has become the territory of that successor State or having any other appropriate connection with that successor State.**

Article 23

Granting of the right of option by the successor States

1. Successor States shall grant a right of option to persons concerned covered by the provisions of article 22 who are qualified to acquire the nationality of two or more successor States.

2. Each successor State shall grant a right to opt for its nationality to persons concerned who are not covered by the provisions of article 22.

SECTION 4

SEPARATION OF PART OR PARTS OF THE TERRITORY

Article 24

Attribution of the nationality of the successor State

When part or parts of the territory of a State separate from that State and form one or more successor States while the predecessor State continues to exist, a successor State shall, unless otherwise indicated by the exercise of a right of option, attribute its nationality to:

(a) persons concerned having their habitual residence in its territory; and

(b) subject to the provisions of article 8:

- (i) persons concerned not covered by subparagraph (a) having an appropriate legal connection with a constituent unit of the predecessor State that has become part of that successor State;

- (ii) persons concerned not entitled to a nationality of any State concerned under subparagraphs (a) and (b) (i) having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last habitual residence in what has become the territory of that successor State or having any other appropriate connection with that successor State.

Article 25

Withdrawal of the nationality of the predecessor State

1. The predecessor State shall withdraw its nationality from persons concerned qualified to acquire the nationality of the successor State in accordance with article 24. It shall not, however, withdraw its nationality before such persons acquire the nationality of the successor State.

2. Unless otherwise indicated by the exercise of a right of option, the predecessor State shall not, however, withdraw its nationality from persons referred to in paragraph 1 who:

(a) have their habitual residence in its territory;

(b) are not covered by subparagraph (a) and have an appropriate legal connection with a constituent unit of the predecessor State that has remained part of the predecessor State;

(c) have their habitual residence in a third State, and were born in or, before leaving the predecessor State, had their last habitual residence in what has remained part of the territory of the predecessor State or have any other appropriate connection with that State.

Article 26

Granting of the right of option by the predecessor and the successor States

Predecessor and successor States shall grant a right of option to all persons concerned covered by the provisions of articles 24 and 25, paragraph 2, who are qualified to have the nationality of both the predecessor and successor States or of two or more successor States.

2. Text of the draft articles with commentaries thereto

48. The text of the draft articles, adopted by the Commission at its fifty-first session, with commentaries thereto are reproduced below:

DRAFT ARTICLES ON NATIONALITY OF NATURAL PERSONS IN RELATION TO THE SUCCESSION OF STATES

Commentary

(1) The draft articles on nationality of natural persons in relation to the succession of States have been prepared on the basis of a request addressed to the International Law Commission by the General Assembly in paragraph 8 of its resolution 51/160 of 16 December 1996. 15/ As the title indicates, the scope of application of the present draft articles is limited, ratione personae, to the nationality of individuals. It does not extend to the nationality of legal persons. Ratione materiae the draft articles encompass the loss and acquisition of nationality, as well as the right of option, as far as they relate to situations of succession of States.

(2) The draft articles are divided into two parts. While the provisions of Part I are general, in the sense that they apply to all categories of succession of States, Part II contains specific provisions on attribution and withdrawal of nationality and on the right of option applicable in different categories of succession of States.

(3) The provisions in Part II are grouped into four sections, each dealing with a specific type of succession of States. This typology follows, in

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15/ Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49).

principle, that of the 1983 Vienna Convention on the Succession of States in respect of State Property, Archives and Debts. Notwithstanding the fact that the Commission has duly taken into account the practice of States during the process of decolonization for the purpose of the elaboration of the provisions in Part I, it decided to limit the specific categories of succession dealt with in Part II to the following: transfer of part of the territory, unification of States, dissolution of a State and separation of part of the territory. It did not include in this Part a separate section on "Newly independent States", as it believed that one of the above four sections would be applicable, _mutatis mutandis_, in any remaining case of decolonization in the future.

PREAMBLE

The General Assembly,

Considering that problems of nationality arising from succession of States concern the international community,

Emphasizing that nationality is essentially governed by internal law within the limits set by international law,

Recognizing that in matters concerning nationality, due account should be taken both of the legitimate interests of States and those of individuals,

Recalling that the Universal Declaration of Human Rights of 1948 proclaimed the right of every person to a nationality,

Recalling also that the International Covenant on Civil and Political Rights of 1966 and the Convention on the Rights of the Child of 1989 recognize the right of every child to acquire a nationality,

Emphasizing that the human rights and fundamental freedoms of persons whose nationality may be affected by a succession of States must be fully respected,

Bearing in mind the provisions of the Convention on the Reduction of Statelessness of 1961, the Vienna Convention on Succession of States in Respect of Treaties of 1978 and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983,

Convinced of the need for the codification and progressive development of the rules of international law concerning nationality in relation to the succession of States as a means for ensuring greater juridical security for States and for individuals,

Declares the following:

Commentary

(1) In the past, the Commission generally presented to the General Assembly sets of draft articles without a draft preamble, leaving its elaboration to States. In this instance, however, the Commission decides to follow the precedent of the two Draft Conventions on the Elimination of Future Statelessness, and on the Reduction of Future Statelessness, which were both submitted with a preamble. [16]

(2) The first preambular paragraph indicates the raison d'être of the present draft articles: the concern of the international community as to the resolution of nationality problems in the case of a succession of States. Such concerns have re-emerged in connection with recent cases of succession of States. A number of international bodies have been dealing with this question. [17]

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[16] See Yearbook ... 1954, vol. II, p. 143. The Draft Declaration on Rights and Duties of States also included a draft preamble. See Yearbook ... 1949, p. 287.

[17] Thus, the Council of Europe adopted on 14 May 1997 a European Convention on Nationality containing, inter alia, provisions regarding the loss and acquisition of nationality in situations of State succession, European Treaty Series No. 166. Another organ of the Council of Europe, the European Commission for Democracy through Law (Venice Commission), adopted in September 1996 a Declaration on the Consequences of State Succession for the Nationality of Natural Persons (hereinafter "Venice Declaration"), Council of Europe document CDL-NAT (96) 7 rev. As for the problem of statelessness, including statelessness resulting from a succession of States, it appears to be of growing interest to the Office of the United Nations High Commissioner for Refugees (UNHCR). For a review of the recent activities of UNHCR in this field, see Carol A. Batchelor, "UNHCR and Issues Related to Nationality", Refugee Survey Quarterly, vol. 14, No. 3, pp. 91-112. See also the report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the work of its forty-sixth session, Official Records of the General Assembly, Fiftieth Session, Supplement No. 12A (A/50/12/Add.1, para. 20), and the report of the Subcommittee of the Whole on International Protection (A/AC.96/858, paras. 21-27), as well as General Assembly resolution 51/175 of 12 December 1996, entitled "Office of the United Nations High Commissioner for Refugees".

(3) The second preambular paragraph expresses the point that, although nationality is essentially governed by national legislation, the competence of States in this field may be exercised only within the limits set by international law. These limits have been established by various authorities. In its advisory opinion in the case concerning Nationality Decrees Issued in Tunis and Morocco, 18/ the Permanent Court of International Justice emphasized that the question whether a matter was solely within the jurisdiction of a State was essentially a relative question, depending upon the development of international relations, and it held that even in respect of matters which in principle were not regulated by international law, the right of a State to use its discretion might be restricted by obligations which it might have undertaken towards other States, so that its jurisdiction became limited by rules of international law. 19/ Similarly, article 2 of the 1929 Harvard Draft Convention on Nationality asserts that the power of a State to confer its nationality is not unlimited. 20/ Article 1 of The Hague Convention of 1930 on Certain Questions relating to the Conflict of Nationality Laws provides that, while it is for each State to determine under its own law who are its nationals, such law shall be recognized by other States only "insofar as it is consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality". 21/ Moreover, the Commission considers that, in the specific context of a succession of States, international law has an even larger role to play, as such situation may involve a change of nationality on a large scale.

(4) Further international obligations of States in matters of nationality emerged with the development of human rights law after the Second World War, although the need for the respect of the rights of individuals had also been pointed out in connection with the preparations for the 1930 Hague

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18/ P.C.I.J. 1923, Series B, No. 4, p. 24.

19/ See also Sir Robert Jennings and Sir Arthur Watts, eds., Oppenheim's International Law, 9th ed., vol. I (London, Longman, 1992), p. 852.

20/ American Journal of International Law, vol. 23 (Special Suppl.) (1929), p. 13.

21/ See Laws concerning nationality, United Nations Legislative Series, ST/LEG/SER.B/4, p. 567.

Conference. 22/ As it was stated more recently by the Inter-American Court of Human Rights, "the manner in which States regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; [the powers enjoyed by the States in that area] are also circumscribed by their obligations to ensure the full protection of human rights". 23/

(5) As a result of this evolution in the field of human rights, the traditional approach based on the preponderance of the interests of States over the interests of individuals has subsided. Accordingly, the Commission finds it appropriate to affirm in the third preambular paragraph that, in matters concerning nationality, the legitimate interests of both States and individuals should be taken into account. 24/

(6) The fourth, fifth and seventh preambular paragraphs recall international instruments which are of direct relevance to the present draft articles. The instruments referred to in the seventh preambular paragraph are the product of the earlier work of the Commission in the two fields of nationality and of succession of States.

(7) The sixth preambular paragraph expresses the fundamental concern of the Commission with the protection of the human rights of persons whose nationality may be affected following a succession of States. State practice has focused on the obligation of the new States born from the territorial changes to protect the basic rights of all inhabitants of their territory without distinction. 25/ The Commission, however, concludes, that, as a

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22/ "The scope of municipal laws governing nationality must be regarded as limited by consideration of the rights and obligations of individuals and of other States." League of Nations Conference for the Codification of International Law, Bases for Discussion, vol. I (Nationality), C.73.M.38. 1929.V, Reply of the United States of America, p. 16.

23/ Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica (1984), International Law Reports, vol. 79, para. 32.

24/ See also the first preambular paragraph of the Venice Declaration, Council of Europe document CDL-NAT (96) 7 rev. and the fourth preambular paragraph of the European Convention on Nationality, European Treaty Series No. 166.

25/ See Third report on nationality in relation to the succession of States, document A/CN.4/480, paras. (1) to (3) and (5) of the commentary to draft article 11 proposed by the Special Rapporteur.

matter of principle, it was important to safeguard basic rights and fundamental freedoms of all persons whose nationality may be affected by a succession, irrespective of the place of their habitual residence.

(8) The eighth preambular paragraph underlines the need for the codification and progressive development of international law in the area under consideration, i.e. nationality of natural persons in relation to the succession of States. It is interesting to note that, as early as 1956, D.P. O'Connell, while recognizing that "[t]he effect of change of sovereignty upon the nationality of the inhabitants of the [territory affected by the succession] is one of the most difficult problems in the law of State succession", stressed that "[u]pon this subject, perhaps more than any other in the law of State succession, codification or international legislation is urgently demanded". 26/ The wording of this preambular paragraph is essentially based on the equivalent paragraphs of the preambles to the Vienna Conventions on Succession of States of 1978 and 1983.

PART I. GENERAL PROVISIONS

Article 1

Right to a nationality

> Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned, in accordance with the present draft articles.

Commentary

(1) Article 1 is a key provision, the very foundation of the present draft articles. It states the main principle from which other draft articles are derived. The core element of this article is the recognition of the right to a nationality in the particular context of a succession of States. Thus, it applies to this particular situation the general principle contained in article 15 of the Universal Declaration of Human Rights, which was the first international instrument embodying the "right of everyone to a nationality".

26/ D.P. O'Connell, The Law of State Succession (Cambridge, United Kingdom, Cambridge University Press, 1956), pp. 245 and 258.

(2) The Commission acknowledges that the positive character of article 15 has been disputed in the doctrine. 27/ It has been argued, in particular, that it is not possible to determine the State vis-à-vis which a person would be entitled to present a claim for nationality, i.e. the addressee of the obligation corresponding to such a right. 28/ However, in the case of a succession of States, it is possible to identify such State. It is either the successor State, or one of the successor States when there are more than one, or, as the case may be, the predecessor State.

(3) The right embodied in article 1 in general terms is given more concrete form in subsequent provisions, as indicated by the phrase "in accordance with the present draft articles". This article cannot therefore be read in isolation.

(4) The identification of the State which is under the obligation to attribute its nationality depends mainly on the type of succession of States and the nature of the links that persons referred to in article 1 may have with one or more States involved in the succession. In most cases, such persons have links with only one of the States involved in a succession. Unification of States is a situation where a single State - the successor State - is the addressee of the obligation to attribute its nationality to these persons. In other types of succession of States, such as dissolution, separation or transfer of territory, the major part of the population has also most, if not all, of its links to one of the States involved in the territorial change: it falls within the category of persons resident in the territory where they were born and with which they are bound by many other links, including family and professional ties, etc.

(5) In certain cases, however, persons may have links to two or even more States involved in a succession. In this event, a person might either end up

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27/ See Johannes M.M. Chan, "The right to a nationality as a human right: The current trend towards recognition", Human Rights Law Journal, vol. 12, Nos. 1-2 (1991), pp. 1-14.

28/ See the comment by Rezek, according to whom article 15 of the Universal Declaration sets out a "rule which evokes unanimous sympathy, but which is ineffective, as it fails to specify for whom it is intended". José Francisco Rezek, "Le droit international de la nationalité", Recueil des cours ... 1986-III, vol. 198, p. 354.

with the nationality of two or more of these States or, as a result of a choice, end up with the nationality of only one of them. Under no circumstances, however, shall a person be denied the right to acquire at least one such nationality. This is the meaning of the phrase "has the right to the nationality of at least one of the States concerned". The recognition of the possibility of multiple nationality resulting from a succession of States does not mean that the Commission intended to encourage a policy of dual or multiple nationality. The draft articles in their entirety are completely neutral on this question, leaving it to the discretion of each and every State. Moreover, articles 8, 9 and 10 provide sufficient opportunities to the States which favour a policy of a single nationality to apply such a policy.

(6) Another element which is stated expressly in article 1 is that the mode of acquisition of the predecessor State's nationality has no effect on the scope of the right of the persons referred to in this provision to a nationality. It is irrelevant in this regard whether they have acquired the nationality of the predecessor State at birth, by virtue of the principles of jus soli or jus sanguinis, or by naturalization, or even as a result of a previous succession of States. 29/ They are all equally entitled to a nationality under the terms of this article.

Article 2

Use of terms

For the purposes of the present draft articles:

(a) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(b) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

29/ As stated in the comment to article 18 of the 1929 Draft Convention on Nationality prepared by Harvard Law School's Research on International Law, "there is no reason whatsoever for drawing a distinction between persons who have acquired nationality at birth and those who have acquired nationality through some process of naturalization prior to the [succession]". (Comments to the 1929 Harvard Draft Convention on Nationality, American Journal of International Law, vol. 23 (Special Suppl.) (1929), p. 63.)

(c) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(d) "State concerned" means the predecessor State or the successor State, as the case may be;

(e) "third State" means any State other than the predecessor State or the successor State;

(f) "person concerned" means every individual who, on the date of the succession of States, had the nationality of the predecessor State and whose nationality may be affected by such succession;

(g) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates.

Commentary

(1) The definitions in subparagraphs (a), (b), (c), (e) and (g) are identical to the respective definitions contained in article 2 of the two Vienna Conventions on the succession of States. The Commission decided to leave these definitions unchanged so as to ensure consistency in the use of terminology in its work on questions relating to the succession of States. 30/ The definitions contained in subparagraphs (d) and (f) have been added by the Commission for the purposes of the present topic.

(2) The term "succession of States", as the Commission already explained in 1974 in its commentary to this definition, is used "as referring exclusively to the fact of the replacement of one State by another in the responsibility for the international relations of territory, leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event". 31/ Unlike the previous work of the Commission relating to the succession of States, the present draft articles deal with the effects of such succession on the legal bond between a State and individuals. It is therefore to be noted that the said replacement of one State by another generally

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30/ See also the earlier position of the Commission on this point. Yearbook ... 1981, vol. II (Part Two), p. 22, document A/36/10, para. (4) of the commentary to article 2 of the draft articles on succession of States in respect of State property, archives and debts.

31/ Yearbook ... 1974, vol. II (Part One), p. 175, document A/9610/Rev.1, para. (3) of the commentary to article 2 of the draft articles on succession of States in respect of treaties.

connotes replacement of one jurisdiction by another with respect to the population of the territory in question, which is of primary importance for the present topic.

(3) The meanings attributed to the terms "predecessor State", "successor State" and "date of the succession of States" are merely consequential upon the meaning given to "succession of States". It must be observed that, in some cases of succession, such as transfer of territory or separation of part of the territory, the predecessor State is not replaced in its entirety by the successor State, but only in respect of the territory affected by the succession.

(4) Subparagraph (d) provides the definition of the term "State concerned", by which, depending on the type of the territorial change, are meant the States involved in a particular case of "succession of States". These are the predecessor State and the successor State in the case of a transfer of part of the territory (art. 20), the successor State alone in the case of a unification of States (art. 21), two or more successor States in the case of a dissolution of States (arts. 22 and 23) and the predecessor State and one or more successor States in the case of a separation of part of the territory (arts. 24 to 26). The term "State concerned" has nothing to do with the "concern" that any other State might have about the outcome of a succession of States in which its own territory is not involved.

(5) Subparagraph (f) provides the definition of the term "person concerned". The Commission considers it necessary to include such a definition, since the inhabitants of the territory affected by the succession of States may include, in addition to the nationals of the predecessor State, nationals of third States and stateless persons residing in that territory on the date of the succession.

(6) It is generally recognized, that "[p]ersons habitually resident in the absorbed territory who are nationals of [third] States and at the same time not nationals of the predecessor State cannot be invested with the successor's nationality. On the other hand ... [t]here is an 'inchoate right' on the part of any State to naturalize stateless persons resident upon its territory". 32/

32/ O'Connell (1956), op. cit. (note 26 above), pp. 257-258. Similarly, it was held in Rene Masson v. Mexico that the change of sovereignty affects only nationals of the predecessor State, while the nationality of

Nevertheless, even the status of the latter category of persons is different from that of the persons who were the nationals of the predecessor State on the date of the succession.

(7) Accordingly, the term "person concerned" includes neither persons who are only nationals of third States nor stateless persons who were present on the territory of any of the "States concerned". It encompasses only individuals who, on the date of the succession of States, had the nationality of the predecessor State and whose nationality may thus be affected by that particular succession of States. By "persons whose nationality may be affected", the Commission means all individuals who could potentially lose the nationality of the predecessor State or, respectively, acquire the nationality of the successor State, depending on the type of succession of States.

(8) Determining the category of individuals affected by the loss of the nationality of the predecessor State is easy in the event of total succession, when the predecessor State or States disappear as a result of the change of sovereignty (unification of States, dissolution of a State): all individuals having the nationality of the predecessor State lose this nationality as an automatic consequence of that State's disappearance. But determining the category of individuals susceptible of losing the predecessor State's nationality is quite complex in the case of partial succession, when the predecessor State survives the change (transfer of part of the territory, separation of part(s) of the territory). In the latter case, it is possible to distinguish among at least two main groups of individuals having the nationality of the predecessor State: persons residing in the territory affected by the change of sovereignty on the date of succession of States (a category which comprises those born therein and those born elsewhere but having acquired the predecessor's nationality at birth or by naturalization) and those born in the territory affected by the change or having another appropriate connection with such territory, but not residing therein on the date of the change. Within the last category, a distinction must be made

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other persons residing in the territory at the time of the transfer is not affected. See John Basset Moore, International Arbitrations to which the United States has been a Party, vol. 3, pp. 2542-2543.

between those individuals residing in the territory which remains part of the predecessor State and those individuals residing in a third State (see art. 25).

(9) The delimitation of the categories of persons susceptible of acquiring the nationality of the successor State is also multifaceted. In the event of total succession, such as the absorption of one State by another State or the unification of States (art. 21), when the predecessor State or States respectively cease to exist, all nationals of the predecessor State or States are candidates for the acquisition of the nationality of the successor State. In the case of the dissolution of a State, the situation becomes more complicated owing to the fact that two or more successor States appear and the range of individuals susceptible of acquiring the nationality of each particular successor State has to be defined separately. It is obvious that there will be overlaps between the categories of individuals susceptible of acquiring the nationality of the different successor States (art. 22). Similar difficulties will arise with the delimitation of the categories of individuals susceptible of acquiring the nationality of the successor State in the event of secession (art. 24) or transfer of a part or parts of territory (art. 20). This is a function of the complexity of the situations and the need to respect the will of persons concerned.

(10) The definition in subparagraph (f) is restricted to the clearly circumscribed category of persons who had in fact the nationality of the predecessor State.

Article 3

Cases of succession of States covered by the present draft articles

> The present draft articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.

Commentary

(1) As it already stated in the commentary to article 6 of the draft articles on succession of States in respect of treaties, "[t]he Commission in preparing draft articles for the codification of the rules of international law relating to normal situations naturally assumes that those articles are to apply to facts occurring and situations established in conformity with

international law. Accordingly, it does not as a rule state that their application is so limited. Only when matters not in conformity with international law call for specific treatment or mention does it deal with facts or situations not in conformity with international law". 33/ Nevertheless, the two Vienna Conventions on the Succession of States contain a provision limiting explicitly their scope of application to successions of States occurring in conformity with international law. 34/

(2) For purposes of consistency with the approach adopted in the above two Conventions, the Commission decided to include in the present draft articles the provision in article 3 which is based on the relevant provisions of these instruments, although it is evident that the present draft articles address the question of the nationality of natural persons in relation to a succession of States which took place in conformity with international law. The Commission considered that it was not incumbent upon it to study questions of nationality which could arise in situations such as illegal annexation of territory.

(3) The Commission stresses that article 3 is without prejudice to the "right of everyone to a nationality" in accordance with article 15 of the Universal Declaration of Human Rights.

Article 4

Prevention of statelessness

> States concerned shall take all appropriate measures to prevent persons who, on the date of the succession of States, had the nationality of the predecessor State from becoming stateless as a result of such succession.

Commentary

(1) The obligation of the States involved in the succession to take all appropriate measures in order to prevent the occurrence of statelessness is a corollary of the right of the persons concerned to a nationality. As has been stated by experts of the Council of Europe, "it is a responsibility of States

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33/ *Yearbook ... 1974*, vol. II (Part One), p. 181, document A/9610/Rev.1, para. (1) of the commentary to draft article 6.

34/ See article 6 of the Vienna Convention on Succession of States in respect of Treaties and article 3 of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

to avoid statelessness"; 35/ this was one of the main premises on which they based their examination of nationality laws in recent cases of succession of States in Europe.

(2) The growing awareness among States of the compelling need to fight the plight of statelessness has led to the adoption, since 1930, of a number of multilateral treaties relating to this problem, such as the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, 36/ its Protocol relating to a Certain Case of Statelessness and its Special Protocol concerning Statelessness, as well as the 1954 Convention relating to the Status of Stateless Persons 37/ and the 1961 Convention on the Reduction of Statelessness. 38/ It is true that only very few provisions of the above Conventions directly address the issue of nationality in the context of succession of States. Nevertheless, they provide useful guidance to the States concerned by offering solutions which can mutatis mutandis be used by national legislators in search of solutions to problems arising from territorial change.

(3) An obvious solution consists in adopting legislation which ensures that no person having an appropriate connection to a State will be excluded from the circle of persons to whom that State grants its nationality. The concern of avoiding statelessness is most apparent in the regulation of conditions regarding the loss of nationality. In the literature, it has thus been observed that the renunciation of nationality not conditioned by the acquisition of another nationality has become obsolete. 39/

(4) A technique used by the legislators of States concerned in the case of a succession of States is to enlarge the circle of persons entitled to acquire

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35/ See "Report of the Experts of the Council of Europe on the Citizenship Laws of the Czech Republic and Slovakia and their Implementation", Strasbourg, 2 April 1996, para. 54.

36/ See Laws concerning nationality, op. cit. (note 21 above), p. 567.

37/ United Nations, Treaty Series, vol. 360, p. 117.

38/ Ibid., vol. 989, p. 175.

39/ Henri Batiffol and Paul Lagarde, Droit international privé, 7th ed., vol. I (Paris, Librairie générale de droit et de jurisprudence, 1981), pp. 82-83.

their nationality by granting a right of option to that effect to those who would otherwise become stateless. Examples of provisions of this nature include section 2, subsection (3), of the Burma Independence Act, article 6 of the Law on Citizenship of the Czech Republic, and article 47 of the Yugoslav Citizenship Law (No. 33/96). 40/

(5) The effectiveness of national legislations in preventing statelessness is, however, limited. A more effective measure is for States concerned to conclude an agreement by virtue of which the occurrence of statelessness would be precluded. This is also the philosophy underlying article 10 of the 1961 Convention on the Reduction of Statelessness. 41/

(6) Article 4 does not set out an obligation of result, but an obligation of conduct. In the case of unification of States, this distinction has no practical significance, for the obligation to take all appropriate measures to prevent persons concerned from becoming stateless means, in fact, the obligation of the successor State to attribute in principle its nationality to all such persons. 42/ However, the distinction between obligation of result and obligation of conduct is relevant in other cases of succession of States where at least two States concerned are involved. Obviously, one cannot consider each particular State concerned to be responsible for all cases of statelessness resulting from the succession. A State can reasonably be asked only to take appropriate measures within the scope of its competence as

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40/ See Third report on nationality in relation to the succession of States, document A/CN.4/480 and Corr.1 (French only), p. 42, paras. (6) to (8) of the commentary to draft article 2 proposed by the Special Rapporteur.

41/ Article 10 reads as follows:

> **"1. Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer. A Contracting State shall use its best endeavours to secure that any such treaty made by it with a State which is not a Party to this Convention includes such provisions.**
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> **"2. In the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition."**

42/ This obligation is limited by the provisions of article 8.

delimited by international law. Accordingly, when there is more than one successor State, not every one has the obligation to attribute its nationality to every single person concerned. Similarly, the predecessor State does not have the obligation to retain all persons concerned as its nationals. Otherwise, the result would be, first, dual or multiple nationality on a large scale and, second, the creation, also on a large scale, of legal bonds of nationality without appropriate connection.

(7) Thus, the principle stated in article 4 cannot be more than a general framework upon which other, more specific, obligations are based. The elimination of statelessness is a final result to be achieved by means of the application of the entire set of draft articles, in particular through coordinated action of States concerned.

(8) As is the case with the right to a nationality set out in article 1, statelessness is to be prevented under article 4 in relation to persons who, on the date of the succession of States, were nationals of the predecessor State, i.e. "persons concerned" as defined in article 2, subparagraph (f). The Commission decides, for stylistic reasons, not to use the term "person concerned" in article 4, so as to avoid a juxtaposition of the expressions "States concerned" and "persons concerned".

(9) Article 4 does not therefore encompass persons resident in the territory of the successor State who had been stateless under the regime of the predecessor State. The successor State has certainly a discretionary power to attribute its nationality to such stateless persons. But this question is outside the scope of the present draft articles.

Article 5

Presumption of nationality

> Subject to the provisions of the present draft articles, persons concerned having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor State on the date of such succession.

Commentary

(1) The purpose of article 5 is to address the problem of the time-lag between the date of the succession of States and the adoption of legislation or, as the case may be, the conclusion of a treaty between States concerned on

the question of the nationality of persons concerned following the succession. Since such persons run the risk of being treated as stateless during this period, the Commission feels it important to state, as a presumption, the principle that, on the date of the succession of States, the successor State attributes its nationality to persons concerned who are habitual residents of the territory affected by such succession. The presumption stated in article 5 also underlies basic solutions envisaged in Part II for different types of succession of States.

(2) This is, however, a rebuttable presumption. Its limited scope is expressed by the opening clause "subject to the provisions of the present draft articles", which clearly indicates that the function of this principle must be assessed in the overall context of the other draft articles. Accordingly, when their application leads to a different result, as may happen, for example, when a person concerned opts for the nationality of the predecessor State or of a successor State other than the State of habitual residence, the presumption ceases to operate.

(3) Similarly where questions of nationality are regulated by a treaty between States concerned, the provisions of such treaty may also rebut the presumption of the acquisition of the nationality of the State of habitual residence.

(4) As regards the criterion on which this presumption relies, it derives from the application of the principle of effective nationality to the specific case of the succession of States. As Rezek has stressed, "the juridical relationship of nationality should not be based on formality or artifice, but on a real connection between the individual and the State". 43/ Habitual residence is the test that has most often been used in practice for defining the basic body of nationals of the successor State, even if it was not the only one. 44/ This is explained by the fact that "the population has a

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43/ Rezek, op. cit. (note 28 above), p. 357.

44/ O'Connell termed it "the most satisfactory test". D.P. O'Connell, State Succession in Municipal Law and International Law, vol. I (Cambridge, United Kingdom, Cambridge University Press, 1967), p. 518. See also the decision by an Israeli court concerning the 1952 law on Israeli nationality, according to which "[s]o long as no law has been enacted providing otherwise ... every individual who, on the date of the establishment of the State of Israel was resident in the territory which today constitutes the 'territorial' or local status, and this is unaffected whether there is a universal or partial successor and whether there is a cession, i.e., a 'transfer' of sovereignty, or a relinquishment by one State followed by a disposition by international authority". 45/ Also, in the view of experts of the Office of the United Nations High Commissioner for Refugees (UNHCR), "there is substantial connection with the territory concerned through residence itself". 46/

Article 6

Legislation on nationality and other connected issues

> Each State concerned should, without undue delay, enact legislation on nationality and other connected issues arising in relation to the succession of States consistent with the provisions of the present draft articles. It should take all appropriate measures to ensure that persons concerned will be apprised, within a reasonable time period, of the effect of its legislation on their nationality, of any choices they may have thereunder, as well as of the consequences that the exercise of such choices will have on their status.

Commentary

(1) Article 6 is based on the recognition of the fact that, in the case of a succession of States, in spite of the role reserved to international law, domestic legislation with regard to nationality has always an important function. The main focus of this article, however, is the issue of the

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State of Israel, is also a national of Israel. Any other view must lead to the absurd result of a State without nationals - a phenomenon the existence of which has not yet been observed." (Ian Brownlie, "The Relations of Nationality in Public International Law", British Year Book of International Law, vol. 39, 1963, p. 318. In another case, however, it was held that Israeli nationality had not existed prior to the adoption of the law in question. In ibid.

45/ Ian Brownlie, Principles of Public International Law, 4th ed. (Oxford, Clarendon Press, 1990), p. 665.

46/ "The Czech and Slovak citizenship laws and the problem of statelessness", document prepared by UNHCR, February 1996, para. 29. As it has also been noted, "it is in the interest of the successor State ... to come as close as possible, when defining its initial body of citizens, to the definition of persons having a genuine link with that State. If a number of persons are considered to be 'foreigners' in 'their own country' clearly that is not in the interest of the State itself". Report of the Experts of the Council of Europe on the Citizenship Laws, op. cit.(note 35 above), para. 144.

timeliness of internal legislation. In this respect, the practice of States varies. While in some cases the legislation concerning nationality was enacted at the time of the succession of States, 47/ in other cases the nationality laws were enacted after the date of the succession, sometimes even much later. 48/ The term "legislation" as used in this article should be interpreted broadly: it includes more than the legal rules adopted by Parliament. 49/

(2) It would not be realistic in many cases to expect States concerned to enact such legislation at the time of the succession. In some situations, for instance where new States are born as a result of a turbulent process and territorial limits are unclear, this would even be impossible. Accordingly, article 6 sets out a recommendation that States concerned enact legislation concerning nationality and other connected issues arising in relation with the succession of States "without undue delay". The period which meets such test may be different for each State concerned, even in relation to the same succession. Indeed, the situation of a predecessor State and a successor State born as a result of separation (Part II, Section 4) may be very different in this regard. For example, the question of the loss of the nationality of the predecessor State may be already adequately addressed by pre-existing legislation. 50/

(3) The Commission considers it necessary to state explicitly that the legislation to be enacted by States concerned should be "consistent with the

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47/ This was the case of a number of newly independent States. See Materials on succession of States in respect of matters other than treaties, United Nations Legislative Series, ST/LEG/SER.B/17, *passim*. For more recent examples, see, e.g., the Law on Acquisition and Loss of Citizenship of the Czech Republic of 29 December 1992, enacted in parallel to the dissolution of Czechoslovakia, and the Law on Croatian Nationality of 28 June 1991, enacted in parallel to the proclamation of the independence of Croatia.

48/ See, e.g., the Law on Israeli Nationality of 1952, referred to in note 44 above.

49/ See a similar interpretation by Rezek of the notion of legislation in relation to nationality, op. cit.(note 28 above), p. 372.

50/ See Second report on State succession and its impact on the nationality of natural and legal persons, document A/CN.4/474, para. 89, as regards the cession by Finland of part of its territory to the Soviet Union in 1947.

provisions of the present draft articles". This underscores the importance of respect for the principles set out in the draft articles, to which States are urged to give effect through their domestic legislation. This is without prejudice to the obligations that States concerned may have under the terms of any relevant treaty. 51/

(4) The legislation envisaged under article 6 is not limited to the questions of attribution or withdrawal of nationality in a strict sense, and, where appropriate, the question of the right of option. It should also address "connected issues", i.e. issues which are intrinsically consequential to the change of nationality upon a succession of States. These may include such matters as the right of residence, the unity of families, military obligations, pensions and other social security benefits, etc. States concerned may find it preferable to regulate such matters by means of a treaty, 52/ a possibility that article 6 in no way precludes.

(5) The second sentence of article 6 reflects the importance that the Commission attaches to ensuring that persons concerned are not reduced to a purely passive role as regards the impact of the succession of States on their individual status or confronted with adverse effects of the exercise of a right of option of which they could objectively have no knowledge when exercising such right. This issue arises, of course, only when a person concerned finds itself having ties with more than one State concerned. The reference to "choices" should be understood in a broader sense than simply the option between nationalities. The measures to be taken by States should be "appropriate" and timely, so as to ensure that any rights of choice to which persons concerned may be entitled under their legislation are indeed effective.

(6) Given the complexity of the problems involved, and the fact that certain "connected issues" may sometimes only be resolved by means of a treaty, article 6 is couched in terms of a recommendation.

51/ The principle that "the contractual stipulations between the two [States concerned] ... shall always have preference" over the legislation of States involved in the succession is also embodied in article 13 of the Bustamante Code. See "Code of Private International Law" (Code Bustamante), League of Nations, Treaty Series, vol. LXXXVI, No. 1950.

52/ For examples of such practice, see Third report on nationality in relation to the succession of States, document A/CN.4/480, note 282.

Article 7

Effective date

The attribution of nationality in relation to the succession of States, as well as the acquisition of nationality following the exercise of an option, shall take effect on the date of such succession, if persons concerned would otherwise be stateless during the period between the date of the succession of States and such attribution or acquisition of nationality.

Commentary

(1) The Commission recognizes that one of the general principles of law is the principle of non-retroactivity of legislation. As regards nationality issues, this principle has an important role to play, for as stated by Lauterpacht, "[w]ith regard to questions of status, the drawbacks of retroactivity are particularly apparent." 53/ However, the Commission considers that, in the particular case of a succession of States, the benefits of retroactivity justify an exception to the above general principle, notwithstanding the fact that the practice of States is inconclusive in this respect.

(2) Article 7 is closely connected to the issue dealt with in article 6. It has however, a broader scope of application, as it covers the attribution of nationality not only on the basis of legislation, but also on the basis of a treaty. If such attribution of nationality after the date of the succession of States did not have a retroactive effect, statelessness, even if only temporary, could ensue. Under the terms of article 7, the retroactive effect extends to both the automatic attribution of nationality and to the acquisition of nationality following the exercise of an option, provided that persons concerned would otherwise be stateless during the period between the date of the succession of States and the date of the exercise of such option. The Commission decided to formulate this article in terms of obligations incumbent on States concerned, in particular to ensure consistency with the obligations of such States with a view to preventing statelessness under article 4.

53/ Hersch Lauterpacht, "The Nationality of Denationalized Persons", The Jewish Yearbook of International Law (1948), p. 168.

(3) Article 7 is the first article where the expression "attribution of nationality" is used. The Commission considered it preferable, in the present draft articles, to use this term rather than the term "granting" to refer to the act of the conferral by a State of its nationality to an individual. It was felt that the term "attribution" best conveyed the point that the acquisition of nationality upon a succession of States is distinct from the process of acquisition of nationality by naturalization. It also indicates that the State does not have the same freedom of action with regard to cases of attribution as it has in cases involving naturalization. Where a provision is drafted from the perspective of the individual, the Commission has used the expression "acquisition of nationality".

Article 8

Persons concerned having their habitual residence in another State

1. A successor State does not have the obligation to attribute its nationality to persons concerned if they have their habitual residence in another State and also have the nationality of that or any other State.

2. A successor State shall not attribute its nationality to persons concerned who have their habitual residence in another State against the will of the persons concerned unless they would otherwise become stateless.

Commentary

(1) The attribution of the nationality of the successor State is subject to certain exceptions of a general character which apply to all types of succession of States. These exceptions, spelled out in article 8, concern both the obligation of the successor State to attribute its nationality and the power of the State to do so. Their purpose is to establish a balance between the competing jurisdictions of the successor State and other States where persons concerned have their habitual residence outside the former while still pursuing the goal of preventing statelessness.

(2) This question has been widely debated in the doctrine, an analysis of which leads to the following two conclusions: first, a successor State does not have the obligation to attribute its nationality to the persons concerned who would otherwise satisfy all the criteria required for acquiring its nationality but who have their habitual residence in a third State and also

have the nationality of a third State; second, a successor State cannot attribute its nationality to persons who would otherwise qualify to acquire its nationality but who have their habitual residence in a third State and also have the nationality of that State against their will. 54/ When referring to a "third" State, commentators had in fact in mind States other than either the predecessor State, or, as the case may be, another successor State. The Commission, however, considers that there is no reason not to extend the application of article 8 also to persons concerned who have their habitual residence not in a "third State", but in another "State concerned". Finally, as explicitly stated in paragraph 1 and as implied in paragraph 2, article 8 covers both persons who have their habitual residence in the State of which they are nationals as well as persons who have their habitual residence in one State, while being nationals of yet another State.

(3) Accordingly, paragraph 1 lifts, under specific conditions, any obligation which a successor State may have to attribute its nationality to persons concerned, as a corollary of a right of a person concerned to a nationality under the terms of article 1 of the present draft articles. However, if a person referred to in paragraph 1 who has an appropriate connection 55/ with a successor State wishes to acquire the nationality of that State, e.g. by exercising an option to that effect, the obligation of the latter to attribute its nationality to that person is not lifted. Indeed in such a case article 11, paragraph 3 applies. Paragraph 1 of article 8 concerns the attribution of nationality by virtue of national legislation. It is, however, without prejudice to any obligation of a successor State vis-à-vis other States concerned under any relevant treaty.

(4) Paragraph 2 restricts the power of a successor State to attribute its nationality to persons concerned not residing in its territory and having the nationality of another State. However, a successor State may attribute its nationality to such persons on a consensual basis. This raises the question as to how consent should be ascertained. Establishing a requirement of explicit consent would not be a practical solution, as it would put a heavy

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54/ For State practice, see O'Connell (1956), op. cit. (note 26 above), pp. 251-258.

55/ As to the expression "appropriate connection", see paragraphs (9) and (10) of the commentary to article 11.

administrative burden on the successor State. The Commission considers it preferable to introduce a rebuttable presumption of consent where persons concerned being offered an option to reject the nationality of the successor State remain silent. This is reflected in the expression "not ... against their will" used in paragraph 2.

(5) The restriction of the competence of the successor State under paragraph 2 does not apply when it would result in statelessness. In such case, that State has the right to attribute its nationality to a person referred to in paragraph 1, irrespective of that person's will.

Article 9

Renunciation of the nationality of another State as a condition for attribution of nationality

> When a person concerned who is qualified to acquire the nationality of a successor State has the nationality of another State concerned, the former State may make the attribution of its nationality dependent on the renunciation by such person of the nationality of the latter State. However, such requirement shall not be applied in a manner which would result in rendering the person concerned stateless, even if only temporarily.

Commentary

(1) It is generally accepted that, as a means of reducing or eliminating dual and multiple nationality, a State may require the renunciation of the nationality of another State as a condition for granting its nationality. This requirement is also found in some legislations of successor States, namely in relation to the voluntary acquisition of their nationality upon the succession.

(2) It is not for the Commission to suggest which policy States should pursue on the matter of dual or multiple nationality. Accordingly, the draft articles are neutral in this respect. The Commission is nevertheless concerned with the risk of statelessness related to the above requirement of prior renunciation of another nationality. Similar concerns have been voiced in other forums. 56/

56/ Accordingly, experts of the Council of Europe concluded that "a State which gives an unconditional promise to grant its nationality is responsible at an international level for the *de jure* statelessness which arises from the release of a person from his or her previous nationality, on the basis of this promise". Report of the Experts of the Council of Europe on

(3) The practice of States indicates that, in relation to a succession of States, the requirement of renunciation applied only with respect to the nationality of another State concerned, but not the nationality of a "third State". 57/ In any event, only the former aspect falls within the scope of the present topic. Article 9 is drafted accordingly.

(4) The first sentence underscores the freedom of each successor State in deciding whether to make the acquisition of its nationality dependent on the renunciation by a person concerned of the nationality of another State concerned. Such is the function of the word "may". The second sentence addresses the problem of statelessness. It does not prescribe a particular legislative technique. It just sets out a general requirement that the condition in question should not be applied in such a way as to render the person concerned stateless, even if only temporarily.

(5) The expression "another State concerned" may refer to the predecessor State, or, as the case may be, to another successor State, as the rule in article 9 applies in all situations of succession of States, except, of course, unification, where the successor State remains as the only "State concerned".

Article 10

Loss of nationality upon the voluntary acquisition of the nationality of another State

1. A predecessor State may provide that persons concerned who, in relation to the succession of States, voluntarily acquire the nationality of a successor State shall lose its nationality.

2. A successor State may provide that persons concerned who, in relation to the succession of States, voluntarily acquire the nationality of another successor State or, as the case may be, retain the nationality of the predecessor State shall lose its nationality acquired in relation to such succession.

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the Citizenship Laws, op. cit. (note 35 above), para. 56.

57/ See the Third report on nationality in relation to the succession of States, document A/CN.4/480, para. (31) of the commentary to draft articles 7 and 8 proposed by the Special Rapporteur.

Commentary

(1) As in the case of the preceding article, article 10 contains a provision that derives from a rule of a more general application, which has been adapted to the case of a succession of States. The loss of a State's nationality upon the voluntary acquisition of the nationality of another State is a routine provision in the legislation of States pursuing a policy aimed at avoiding dual or multiple nationality. In the same vein, the Montevideo Convention on Nationality of 26 December 1936 stipulates that any naturalization (presumably voluntary) of an individual in a signatory State carries with it the loss of the nationality of origin. 58/ Likewise, according to the 1963 Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, concluded within the framework of the Council of Europe, persons who of their own free will acquire another nationality, by means of naturalization, option or recovery, lose their former nationality. 59/

(2) Provisions of this kind are also to be found in legislations adopted in relation to a succession of States. Thus, article 20 of the Law on Citizenship of the Republic of Belarus of 18 October 1991 provides that "[t]he citizenship of the Republic of Belarus will be lost ... upon acquisition, by the person concerned, of the citizenship of another State, unless otherwise provided by a treaty binding upon the Republic of Belarus ... The loss of citizenship becomes effective at the moment of the registration of the relevant fact by the competent authorities ...". 60/

(3) Article 10 applies in all types of succession of States, except unification, where the successor State remains as the only "State concerned". It recognizes that any successor or predecessor State, as the case may be, is entitled to withdraw its nationality from persons concerned who, in relation

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58/ Article 1. Laws concerning nationality, op. cit. (note 21 above), p. 585.

59/ Article 1. United Nations Treaty Series, vol. 634, p. 224. The possibility for a State to withdraw its nationality as a consequence of the voluntary acquisition of another nationality is also recognized under article 7, paragraph 1 a, of the 1997 European Convention on Nationality, European Treaty Series No. 166.

60/ See the materials submitted by Belarus.

to the succession of States, voluntarily acquired the nationality of another State concerned. It leaves aside the question of the voluntary acquisition of the nationality of a third State, as it is beyond the scope of the present topic.

(4) The rights of the predecessor State (paragraph 1) and that of the successor State (paragraph 2) are spelled out separately for reasons of clarity. As regards paragraph 2, depending on the type of succession of States, the assumption is the voluntary acquisition of the nationality of another successor State (in the case of dissolution) or the voluntary retention of the nationality of the predecessor State (in the case of separation or transfer of part of the territory) or even both (in the event of the creation of several successor States by separation of parts of territory from a predecessor State which continues to exist).

(5) Article 10 does not address the question as to when the loss of nationality should become effective. Since it is for the State concerned itself to decide on the main question, i.e. whether to withdraw its nationality from a person upon the voluntary acquisition of the nationality of another State, it is also for that State to determine when such withdrawal becomes effective. This may occur upon the acquisition of the nationality of another State or later, e.g. after a person concerned has effectively transferred his or her habitual residence outside the territory of the State whose nationality he or she is to lose. 61/ In any event, the State concerned shall not withdraw its nationality from persons concerned who have initiated a procedure aimed at acquiring the nationality of another State concerned before such persons effectively acquire the nationality of the latter State.

Article 11

Respect for the will of persons concerned

> 1. States concerned shall give consideration to the will of persons concerned whenever those persons are qualified to acquire the nationality of two or more States concerned.

61/ This was for instance the case as regards the cession by Finland of a part of its territory to the Soviet Union in 1947. See Second report on State succession and its impact on the nationality of natural and legal persons, document A/CN.4/474, para. 89.

2. Each State concerned shall grant a right to opt for its nationality to persons concerned who have appropriate connection with that State if those persons would otherwise become stateless as a result of the succession of States.

3. When persons entitled to the right of option have exercised such right, the State whose nationality they have opted for shall attribute its nationality to such persons.

4. When persons entitled to the right of option have exercised such right, the State whose nationality they have renounced shall withdraw its nationality from such persons, unless they would thereby become stateless.

5. States concerned should provide a reasonable time limit for the exercise of the right of option.

Commentary

(1) Numerous treaties regulating questions of nationality in connection with the succession of States as well as relevant national laws have provided for the right of option or for a similar procedure enabling individuals concerned to establish their nationality by choosing either between the nationality of the predecessor and that of the successor States or between the nationalities of two or more successor States.

(2) This was, for example, the case of the Treaty of Peace, Friendship, Limits and Settlement between Mexico and the United States of America of 2 February 1848, or the Treaty on the Delimitation of the Frontier between Mexico and Guatemala, of 27 September 1882. 62/ The Peace Treaties adopted after the end of the First World War provided for a right of option mainly as a means to correct the effects of their other provisions on the automatic acquisition of the nationality of the successor State and loss of the nationality of the predecessor State by persons habitually resident in the territories involved in the succession of States. 63/ A right of

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62/ See Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paras. (5) and (8) of the commentary to draft article 17 proposed by the Special Rapporteur.

63/ See articles 37, 85, 91, 106 and 113 of the Treaty of Peace between the Allied and Associated Powers and Germany signed at Versailles on 28 June 1919 (Materials on succession of States, op. cit. (see note 47 above), pp. 20, 28-32, and 489), articles 78-82 of the Treaty of Peace between the Allied and Associated Powers and Austria signed at Saint-Germain-en-Laye on 10 September 1919 (G.F. de Martens, Nouveau recueil général de traités, option was also granted in article 19 of the Treaty of Peace between the Allied and Associated Powers and Italy of 10 February 1947. 64/

(3) Among the documents concerning nationality issues in relation to decolonization, while some contained provisions on the right of option, several did not. Thus, the Burma Independence Act, after stipulating that the categories of persons specified in the First Schedule to that Act automatically lost British nationality, also provided, in section 2, subsection (2), that any such person who was immediately before independence domiciled or ordinarily resident in any place outside Burma in which the British Monarch had jurisdiction over British subjects could, by a declaration made before the expiration of two years after independence, elect to remain a British subject. 65/ The free choice of nationality was also envisaged under article 4 of the Agreement between India and France for the Settlement of the Question of the Future of the French Establishments in India, signed at New Delhi on 21 October 1954. 66/ The Treaty of Cession of the French

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third series, vol. XI, pp. 712-713), respective articles 3 and 4 of the Treaty between the Allied and Associated Powers and Poland signed at Versailles on 28 June 1919, the Treaty between the Allied and Associated Powers and Czechoslovakia and the Treaty between the Allied and Associated Powers and the Serb-Croat-Slovene State, both signed at Saint-Germain-en-Laye on 10 September 1919, as well as the Treaty of Paris between the Allied and Associated Powers and Romania of 9 December 1919, (ibid., vol. XIII, p. 505, pp. 514-515, p. 524 and p. 531 respectively), articles 40 and 45 of the Treaty of Peace between the Allied and Associated Powers and Bulgaria signed at Neuilly-sur-Seine on 27 November 1919 (Materials on succession of States, op. cit., pp. 38-39), article 64 of the Treaty of Peace between the Allied and Associated Powers and Hungary, signed at Trianon on 4 June 1920 (Martens, op. cit, vol. XII, pp. 440-441), article 9 of the Peace Treaty of Tartu of 11 December 1920 concerning the cession by Russia to Finland of the area of Petsamo (see Third report on nationality in relation to the succession of States, document A/CN.4/480, para. (20) of the commentary to draft articles 7 and 8 proposed by the Special Rapporteur), and articles 21 and 31-36 of the Treaty of Lausanne of 1923 (Materials on succession of States, op. cit., pp. 46-47).

64/ Materials on succession of States, op. cit. (note 47 above), p. 59.

65/ Section 2, subsection (3). For the remaining provisions of section 2 on the right of option and its consequences, see also subsections (4) and (6); ibid., p. 146.

66/ Ibid., p. 80.

Establishments of Pondicherry, Karikal, Mahe and Yanam, between India and France, signed at New Delhi on 28 May 1956, as well contained provisions on the right of option. 67/

(4) In recent cases of succession of States in Eastern and Central Europe, where questions of nationality were not resolved by treaty but solely through the national legislation of the States concerned, the possibility of choice was in fact established simultaneously in the legal orders of at least two States. Thus, the Law on the Citizenship of the Slovak Republic contained liberal provisions on the optional acquisition of nationality. According to article 3, paragraph 1, every individual who was on 31 December 1992 a citizen of the Czech and Slovak Federal Republic and did not acquire the citizenship of Slovakia ipso facto, had the right to opt for the citizenship of Slovakia. 68/ No other requirement, such as permanent residence in the territory of Slovakia, was imposed for the optional acquisition of the citizenship of Slovakia by former Czechoslovak citizens.

(5) The function which international law attributes to the will of individuals in matters of acquisition and loss of nationality in cases of succession of States is, however, among the issues on which doctrinal views considerably diverge. 69/ Several commentators have stressed the importance of the right of option in this respect. 70/ While most of them consider that

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67/ Ibid., p. 87.

68/ See Third report on nationality in relation to the succession of States, document A/CN.4/480, para. (30) of the commentary to draft articles 7 and 8 proposed by the Special Rapporteur.

69/ There is a substantial body of doctrinal opinion according to which the successor State is entitled to extend its nationality to those individuals susceptible of acquiring such nationality by virtue of the change of sovereignty, irrespective of the wishes of those individuals. O'Connell (1956), op. cit. (note 26 above), p. 250.

70/ See, e.g. Charles Rousseau, Droit international public, tenth edition, Paris, Dalloz, 1984, p. 169 et seq.

the legal basis of such right can be deduced only from a treaty, others, however, have asserted the existence of an independent right of option as an attribute of the principle of self-determination. 71/

(6) In the view of the Commission, the respect for the will of the individual is a consideration which, with the development of human rights law, has become paramount. However, this does not mean that every acquisition of nationality upon a succession of States must have a consensual basis. The Commission considers that a right of option has a role to play, in particular, in resolving problems of attribution of nationality to persons concerned falling within an area of overlapping jurisdictions of States concerned.

(7) The term "option" used in the present draft articles does not only mean a choice between nationalities, but is used in a broader sense, covering also the procedures of "opting in", i.e. the voluntary acquisition of nationality by declaration, and "opting out", i.e. the renunciation of a nationality acquired ex lege. Such right of option may be provided under national legislation even without agreement between States concerned.

(8) Paragraph 1 of article 11 sets out the requirement of respect for the will of the person concerned where such person is qualified to acquire the nationality of two or several States concerned. The expression "shall give consideration" implies that there is no strict obligation to grant a right of option to this category of persons concerned. This principle, however, is further developed in articles 20, 23 and 26, relating to specific categories of succession of States, where the obligation to grant the right of option is enshrined and where the categories of persons entitled to such a right are also specified. Paragraph 1 does also not prejudice the policy of single or dual nationality which each State concerned may pursue.

(9) Paragraph 2 highlights the function of the right of option as one of the techniques aimed at eliminating the risk of statelessness in situations of succession of States. Such approach was adopted, e.g. in the Burma Independence Act 72/ or in article 6 of the Czech Law on Acquisition and Loss

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71/ See Joseph L. Kunz, "L'option de nationalité", Recueil des cours ... 1930-I, vol. 31, pp. 109-172; "Nationality and Option Clauses in the Italian Peace Treaty of 1947", American Journal of International Law, vol. 41 (1947), pp. 622-631.

72/ See paragraph (3) of the present commentary.

of Citizenship. 73/ The Commission chooses to describe the link which must exist between the persons concerned and a particular State concerned by means of the expression "appropriate connection", which should be interpreted in a broader sense than the notion of "genuine link". The reason for this terminological choice is the paramount importance attached by the Commission to the prevention of statelessness, which, in this particular case, supersedes the strict requirement of an effective nationality.

(10) The core meaning of the term "appropriate connection" in a particular case is spelled out in Part II, where the criteria, such as habitual residence, appropriate legal connection with one of the constituent units of the predecessor State, or the birth in the territory which is a part of a State concerned, are used in order to define categories of persons entitled to the nationality of a State concerned. However, in the absence of the above-mentioned type of links between a person concerned and a State concerned further criteria, such as being a descendant of a person who is a national of a State concerned or having once resided in the territory which is a part of a State concerned, should be taken into consideration.

(11) The Commission decides to couch paragraph 2 in terms of an obligation, in order to ensure consistency with the obligation to prevent statelessness under article 4.

(12) Paragraphs 3 and 4 spell out the consequences of the exercise of the right of option by a person concerned as regards the obligations of the States concerned mentioned therein. The obligations of various States involved in a particular succession may operate jointly, when the right of option is based on a treaty between them, but also separately, when the right of option (in the form of both opting-in or opting-out) is granted solely by the legislation of these States. Thus, acquisition upon option of the nationality of one State concerned does not inevitably imply the obligation of the other State concerned to withdraw its nationality. Such obligation exists only if provided in a treaty between the States concerned or if the person opting for the nationality of one State concerned also renounces the nationality of the other in accordance with the provisions of the latter's legislation.

73/ See Third report on nationality in relation to the succession of States, document A/CN.4/480, note 161.

(13) Paragraph 5 stipulates the general requirement of a reasonable time limit for the exercise of the right of option, irrespective of whether it is provided in a treaty between States concerned or in the legislation of a State concerned. State practice shows that the length of the period during which persons concerned were granted the right of option varied considerably. For example, under the Treaty of Cession of the Territory of Chandernagore between India and France, of 2 February 1951, the right of option was provided for a period of six months, 74/ while the Treaty between Spain and Morocco of 4 January 1969 regarding Spain's retrocession to Morocco of the Territory of Sidi Ifni established a three month period. 75/ In some cases, the right of option was granted for a considerable period of time. 76/ What constitutes a "reasonable" time limit may depend upon the circumstances of the succession of States, but also on the categories to which persons concerned entitled to the right of option belong. In the view of the Commission, a "reasonable time limit" is a time limit necessary to ensure an effective exercise of the right of option.

Article 12

Unity of a family

> Where the acquisition or loss of nationality in relation to the succession of States would impair the unity of a family, States concerned shall take all appropriate measures to allow that family to remain together or to be reunited.

Commentary

(1) There are a number of examples from State practice of provisions addressing the problem of the common destiny of families upon a succession of States. The general policy in the treaties concluded after the First World War was to ensure that the members of a family acquired the same nationality as the head of the family, whether the latter had acquired it automatically or

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74/ Ibid., pp. 77-78.

75/ See Third report on nationality in relation to the succession of States, document A/CN.4/480, para. (28) of the commentary to draft articles 7 and 8 proposed by the Special Rapporteur.

76/ See the Evian Declaration (Algeria-France) of 19 March 1962, United Nations, Treaty Series, vol. 507, pp. 35 and 37.

upon option. 77/ Article 19 of the Treaty of Peace between the Allied and Associated Powers and Italy of 10 February 1947, on the contrary, did not envisage the simultaneous acquisition by a wife of her husband's nationality following his exercise of an option. Minor children, however, automatically acquired the nationality for which the head of the family had opted. 78/

(2) The principle of family unity was also highlighted, albeit in a broader context, in the comment to article 19 of the 1929 Harvard Draft Convention on Nationality, where it was stated that "[i]t is desirable in some measure that members of a family should have the same nationality, and the principle of family unity is regarded in many countries as a sufficient basis for the application of this simple solution". 79/

(3) The approach usually followed during the process of decolonization was to enable a wife to acquire the nationality of her husband upon application, as evidenced by relevant legal instruments of Barbados, Burma, Botswana, Guyana, Jamaica, Malawi, Mauritius, Sierra Leone and Trinidad and Tobago, 80/ or by various treaty provisions, such as annex D to the Treaty concerning the Establishment of the Republic of Cyprus of 16 August 1960 81/ and article 6 of

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77/ See the provisions cited in note 63 above.

78/ Materials on succession of States, op. cit. (note 47 above), p. 59.

79/ Comments to the 1929 Harvard Draft Convention on Nationality, American Journal of International Law, vol. 23 (Special Suppl.) (1929), p. 69. The main deficiency of provisions envisaging the simultaneous change of nationality of all the members of a family following the change of the nationality of the head of the family was the fact that they were placing the woman in a position of subordination. In an attempt to overcome this problem, article 4 of the resolution adopted by the Institute of International Law on 29 September 1896 stipulated that, "[u]nless the contrary has been expressly reserved at the time of naturalization, the change of nationality of the father of a family carries with it that of his wife, if not separated from her, and of his minor children, saving the right of the wife to recover her former nationality by a simple declaration, and saving also the right of option of the children for their former nationality, either in the year following their majority, or beginning with their emancipation, with the consent of their legal assistant". Cited in ibid., p. 75.

80/ Ibid., p. 124, pp. 137-139, pp. 145-146, pp. 203-204, p. 246, pp. 307-308, p. 353, pp. 389-390, and p. 429 respectively.

81/ Ibid., pp. 173-177.

the Treaty of Cession of the French Establishments of Pondicherry, Karikal, Mahe and Yanam, between India and France, signed at New Delhi on 28 May 1956. 82/

(4) A concern for the preservation of the unity of the family is also apparent in some national legislations of successor States that emerged from the recent dissolutions in Eastern and Central Europe. 83/

(5) The Commission is of the view that the thrust of article 12 is closely connected to nationality issues in relation to the succession of States, as the problem of family unity may arise in such a context on a large scale. It also concludes that, while it is highly desirable to enable members of a family to acquire the same nationality upon a succession of States, it is not necessary to formulate a strict rule to this end, as long as the acquisition of different nationalities by the members of a family did not prevent them from remaining together or being reunited. Accordingly, the obligation set out in article 12 is of a general nature. For example, whenever a family faces difficulties in living together as a unit as a result of provisions of nationality laws relating to a succession of States, States concerned are under an obligation to eliminate such legislative obstacles. The expression "appropriate measures", however, is intended to exclude unreasonable demands of persons concerned in this respect.

(6) Concerning possible different interpretations of the concept of "family" in various regions of the world, the Commission is of the view that a succession of States usually involves States from the same region sharing the same or a similar interpretation of this concept, so that the said problem would not arise with frequency.

Article 13

Child born after the succession of States

> **A child of a person concerned, born after the date of the succession of States, who has not acquired any nationality, has the right to the nationality of the State concerned on whose territory that child was born.**

82/ Ibid., p. 87.

83/ For relevant examples, see Third report on nationality in relation to the succession of States, document A/CN.4/480, paras. (20) and (21) of the commentary to draft article 9 proposed by the Special Rapporteur.

Commentary

(1) Article 13 deals with the problem of children born to persons concerned after the date of the succession of States. It follows from its title that the present topic is limited to questions of nationality solely in relation to the occurrence of a succession of States. Questions of nationality related to situations which occurred prior or after the date of the succession are therefore excluded from the scope of the present draft articles. However, the Commission recognizes the need for an exception from the rigid definition *ratione temporis* of the present draft articles and for addressing also the problem of children born after the succession of States from parents whose nationality following the succession has not been determined. Given the fact that, in a considerable number of legal orders, the nationality of children depends to a large extent on that of their parents, the uncertainty about the parents' nationality may have a direct impact on the nationality of a child. The latter is generally determined after the final resolution of the problem of the parents' nationality, but, in exceptional situations, can remain undetermined if, for example, a parent dies in the meantime. That is why the Commission considered that a specific provision concerning the nationality of newborn children was useful.

(2) The inclusion of article 13 is justified in the light of the importance that several instruments attach to the rights of children, including their right to acquire a nationality. Thus, principle 3 of the Declaration of the Rights of the Child provides that "[t]he child shall be entitled from his birth to a name and a nationality". Article 24, paragraph 3, of the International Covenant on Civil and Political Rights guarantees every child the right to acquire a nationality. Article 7, paragraph 1, of the Convention on the Rights of the Child provides that "[t]he child shall be registered immediately after birth and shall have [...] the right to acquire a nationality". [84] From the joint reading of this provision and article 2, paragraph 1, of the Convention, according to which "States Parties shall respect and ensure the rights set forth in the present Convention to each child *within their jurisdiction* without discrimination of any kind" (emphasis

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[84] Paragraph 2 of the same article provides, moreover, that "States Parties shall ensure the implementation of these rights [...] in particular where the child would otherwise be stateless".

added), it follows that, unless the child acquires the nationality of another State, he or she has, in the last instance, the right to the nationality of the State on the territory of which he or she was born.

(3) It is also useful to recall that, according to article 9 of the 1929 Harvard Draft Convention on Nationality, "[a] State shall confer its nationality at birth upon a person born within its territory if such person does not acquire another nationality at birth". 85/ Likewise, article 20 of the American Convention on Human Rights (the "Pact of San José, Costa Rica") of 22 November 1969 stipulates that "[e]very person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality".

(4) There is a strong argument in favour of an approach consistent with the above instruments, namely that, where the predecessor State was a party to any such instruments, their provisions could be applicable, by virtue of the rules of succession in respect of treaties, to the successor State, including as regards the situation envisaged in article 12.

(5) Article 13 is limited to the solution of the problem of the nationality of children born within the territory of States concerned. It does not envisage the situation where a child of a person referred to in article 13 is born in a third State. Extending the scope of application of the rule set out in article 13 to situations where the child was born in a third State would mean to impose a duty on States other than those involved in the succession. While it is true that those third States that are parties to the Convention on the Rights of the Child may already have such obligation in any event, it is also true that this problem exceeds the scope of the present draft articles which should remain limited to problems where a "person concerned" is on one side of the legal bond and a "State concerned" on the other.

(6) While the application ratione temporis of article 13 is limited to the cases of children born after the date of the succession of States, there is no further limitation in time. The Commission is of the view that such an unlimited application is justified by the main purpose of this article, that

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85/ American Journal of International Law, vol. 23 (Special Suppl.) (1929), p. 14.

is, avoidance of statelessness, and by the fact that the rule contained in article 13 is the same as the rule found in several other international instruments applicable to children born on the territory of a State, even outside of the context of State succession.

Article 14

Status of habitual residents

1. The status of persons concerned as habitual residents shall not be affected by the succession of States.

2. A State concerned shall take all necessary measures to allow persons concerned who, because of events connected with the succession of States, were forced to leave their habitual residence on its territory to return thereto.

Commentary

(1) Paragraph 1 of article 14 sets out the rule that the status of habitual residents is not affected by a succession of States as such, or in other words, that persons concerned who are habitual residents of a territory on the date of the succession retain such status. The Commission considers that a succession of States, as such, should not entail negative consequences for the status of persons concerned as habitual residents. The question addressed in paragraph 1 is different from the question whether such persons may or may not retain the right of habitual residence in a State concerned if they acquire, following the succession of States, the nationality of another State concerned.

(2) Paragraph 2 addresses the problem of habitual residents in the specific case where the succession of States is the result of events leading to the displacement of a large part of the population. The purpose of this provision is to ensure the effective restoration of the status of habitual residents as protected under paragraph 1. The Commission feels that, in light of recent experience in Eastern Europe, it was desirable to address explicitly the problem of this vulnerable group of persons.

Article 15

Non-discrimination

States concerned shall not deny persons concerned the right to retain or acquire a nationality or the right of option upon the succession of States by discriminating on any ground.

Commentary

(1) The interest in avoiding discriminatory treatment as regards matters of nationality in relation to a succession of States led to the inclusion of certain relevant provisions in several treaties adopted following the First World War, as attested by the advisory opinion of the Permanent Court of International Justice on the question of Acquisition of Polish Nationality, in which the Court stated that "[o]ne of the first problems which presented itself in connection with the protection of minorities was that of preventing [... new States, ... which, as a result of the war, have had their territory considerably enlarged, and whose population was not therefore clearly defined from the standpoint of political allegiance] from refusing their nationality, on racial, religious or linguistic grounds, to certain categories of persons, in spite of the link which effectively attached them to the territory allocated to one or other of these States". 86/

(2) The problem of discrimination in matters of nationality was also addressed, albeit in a more general context, in article 9 of the 1961 Convention on Reduction of Statelessness, which prohibits the deprivation of nationality on racial, ethnic, religious or political grounds and article 5 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination which requires States to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law in the enjoyment of the right to nationality. The European Convention on Nationality contains a general prohibition of discrimination in matters of nationality as well: article 5, paragraph 1, provides that "[t]he rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin". 87/

(3) While discrimination has been mostly based on the above-mentioned criteria, there may still be other grounds for discrimination in nationality

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86/ P.C.I.J. 1923, Series B, No. 7, p. 15.

87/ Article 18 of the Convention explicitly states that this provision is applicable also in situations of State succession. European Treaty Series No. 166.

matters in relation to a succession of States. 88/ The Commission therefore decides not to include in article 15 an illustrative list of such criteria and opted for a general formula prohibiting discrimination on "any ground", avoiding, at the same time, the risk of any a contrario interpretation.

(4) Article 15 prohibits discrimination resulting in the denial of the right of a person concerned to a particular nationality or, as the case may be, to an option. It does not address the question whether a State concerned may use any of the above or similar criteria for enlarging the circle of individuals entitled to acquire its nationality. 89/

Article 16

Prohibition of arbitrary decisions concerning nationality issues

> Persons concerned shall not be arbitrarily deprived of the nationality of the predecessor State, or arbitrarily denied the right to acquire the nationality of the successor State or any right of option, to which they are entitled in relation to the succession of States.

Commentary

(1) Article 16 applies to the specific situation of a succession of States the principle embodied in article 15, paragraph 2, of the Universal

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88/ See, e.g. recent discussions concerning the application of the requirement of a clean criminal record for attributing nationality upon option. Experts of the Council of Europe stated in this connection that, "[while a] clean criminal record requirement in the context of naturalization is a usual and normal condition and compatible with European standards in this area, ... the problem is different in the context of State succession [where] it is doubtful whether ... under international law citizens that have lived for decades on the territory, perhaps [were] even born there, can be excluded from citizenship just because they have a criminal record ..." (Report of the Experts of the Council of Europe on the Citizenship Laws, op. cit. (note 35 above), paras. 73 and 76). A similar view has been expressed by UNHCR experts, according to whom "[t]he placement of this condition upon granting of citizenship in the context of State succession is not justified [and] would appear discriminatory vis-à-vis a sector of the population which has a genuine and effective link with the [successor State]". (The Czech and Slovak Citizenship Laws and the Problem of Statelessness, op. cit. (note 46 above), para. 76.)

89/ See the advisory opinion of the Inter-American Court of Human Rights of 19 January 1984 in the case concerning Amendments to the naturalization provisions of the Constitution of Costa Rica, International Law Reports, vol. 79, p. 283.

Declaration of Human Rights, which provides that "[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality". The prohibition of arbitrary deprivation of nationality has been reaffirmed in a number of other instruments, such as the 1961 Convention on the Reduction of Statelessness, 90/ the 1989 Convention on the Rights of the Child, 91/ and the 1997 European Convention on Nationality. 92/

(2) Article 16 contains two elements. The first is the prohibition of the arbitrary withdrawal by the predecessor State of its nationality from persons concerned who were entitled to retain such nationality following the succession of States and of the arbitrary refusal by the successor State to attribute its nationality to persons concerned who were entitled to acquire such nationality either ex lege or upon option. The second element is the prohibition of the arbitrary denial of a person's right of option that is an expression of the right of a person to change his or her nationality in the context of a succession of States.

(3) The purpose of the article is to prevent abuses which may occur in the process of the application of any law or treaty which, in themselves, are consistent with the present draft articles. The phrase "to which they are entitled" refers to the subjective right of any such person based on above-described provisions.

Article 17

Procedures relating to nationality issues

Applications relating to the acquisition, retention or renunciation of nationality or to the exercise of the right of option in relation to the succession of States shall be processed without undue delay. Relevant decisions shall be issued in writing and shall be open to effective administrative or judicial review.

90/ Article 8, paragraph 4.

91/ Article 8.

92/ Articles 4, paragraph (c) and 18.

Commentary

(1) Article 17 is intended to ensure that the procedure followed with regard to nationality matters in cases of succession of States is orderly, given its possible large-scale impact. 93/ The elements spelled out in this provision represent minimum requirements in this respect.

(2) The review process regarding decisions concerning nationality in relation to the succession of States has been based in practice on the provisions of municipal law governing review of administrative decisions in general. Such review can be carried out by a competent jurisdiction of an administrative or judicial nature in conformity with the internal law of each State. 94/ The adjective "effective" is intended to stress the fact that an opportunity must be provided to permit meaningful review of the relevant substantive issues. The term can thus be understood in the same sense as in article 2, paragraph 3 (a) of the International Covenant on Civil and Political Rights, where the same word is used. The phrase "administrative or judicial review" used in this article does not suggest that the two types of procedure exclude each other. 95/ Moreover, the word "judicial" should be understood as covering both civil and administrative jurisdictions.

(3) The enumeration of requirements in article 17 is not exhaustive. Thus, for example, the requirement of giving reasons for any negative decisions

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93/ In relation to recent cases of succession of States, the UNHCR Executive Committee stressed the importance of fair and swift procedures relating to nationality issues when emphasizing that "the inability to establish one's nationality ... may result in displacement". (Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the work of its forty-sixth session, Official Records of the General Assembly, Fiftieth Session, Supplement No. 12A (A/50/12/Add.1), para. 20.)

94/ See "Nationalité, minorités et succession d'États dans les pays d'Europe centrale et orientale", CEDIN, Paris X-Nanterre, Table ronde, décembre 1993, responses to the Questionnaire (unpublished).

95/ In the same vein, article 12 of the European Convention on Nationality sets out the requirement that decisions concerning nationality "be open to an administrative or judicial review". The Convention further contains the following requirements regarding procedures relating to nationality: a reasonable time limit for processing applications relating to nationality issues; the provision of reasons for decisions on these matters in writing; and reasonable fees (arts. 10, 11 and 13 respectively). European Treaty Series, No. 166.

concerning nationality should be considered as one of the prerequisites of an effective administrative or judicial review which is implicitly covered. The Commission is also of the view that, in principle, the attribution of nationality should not be subject to any fee, since the attribution of nationality in relation to succession of States occurs on a large scale and the process is not analogous to that of naturalization.

Article 18

Exchange of information, consultation and negotiation

> 1. States concerned shall exchange information and consult in order to identify any detrimental effects on persons concerned with respect to their nationality and other connected issues regarding their status as a result of the succession of States.
>
> 2. States concerned shall, when necessary, seek a solution to eliminate or mitigate such detrimental effects by negotiation and, as appropriate, through agreement.

Commentary

(1) The Commission considers that exchange of information and consultations between States concerned are essential components of any meaningful examination of the effects of a succession of States on persons concerned. The purpose of such endeavours is to identify the negative repercussions a particular succession of States may have both on the nationality of the persons concerned and on other issues intrinsically linked to nationality.

(2) Paragraph 1 sets out the obligations of States concerned in this respect in the most general terms, without indicating the precise scope of the questions which are to be the subject of consultations between them. One of the most important questions is the prevention of statelessness. States concerned, shall, however, also address questions such as dual nationality, the separation of families, military obligations, pensions and other social security benefits, the right of residence, etc.

(3) Concerning paragraph 2, there are two points worth noting. First, the obligation to negotiate to seek a solution does not exist in the abstract: States do not have to negotiate if they have not identified any adverse effects on persons concerned as regards the above questions. Second, it is not presumed that every negotiation must inevitably lead to the conclusion of an agreement. The purpose, for example, could simply be achieved through the

harmonization of national legislations or administrative decisions. States concerned may, however, prefer to conclude an agreement to resolve the problems they have identified. 96/ The obligation in paragraph 2 must be understood in the light of these two caveats.

(4) In the view of the Commission, there is a close link between the obligations in article 18 and the right to a nationality in the context of a succession of States embodied in article 1, as the purpose of the former is to ensure that the right to a nationality is an effective right. Article 18 is also based on the general principle of the law of succession of States providing for the settlement of certain questions relating to succession by agreement between States concerned, embodied in the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

(5) Article 18 does not address the problem which arises when one of the States concerned does not act in conformity with its provisions or when negotiations between States concerned are abortive. Even in such situations, however, there are certain obligations incumbent upon States concerned and the refusal of one party to consult and negotiate does not entail complete freedom of action for the other party. These obligations are included in Part I of the present draft articles.

96/ The Czech Republic and Slovakia, for example, concluded several agreements of this nature, such as the Treaty on interim entitlement of natural and legal persons to profit-related activities on the territory of the other Republic, the Treaty on mutual employment of nationals, the Treaty on the transfer of rights and obligations from labour contracts of persons employed in organs and institutions of the Czech and Slovak Federal Republic, the Treaty on the transfer of rights and obligations of policemen serving in the Federal Police and members of armed forces of the Ministry of the Interior, the Treaty on social security and the administrative arrangement to that Treaty, the Treaty on public health services, the Treaty on personal documents, travel documents, drivers' licences and car registrations, the Treaty on the recognition of documents attesting education and academic titles, the Agreement on the protection of investment and a number of other agreements concerning financial issues, questions of taxation, mutual legal assistance, cooperation in administrative matters, etc.

Article 19

Other States

1. Nothing in the present draft articles requires States to treat persons concerned having no effective link with a State concerned as nationals of that State, unless this would result in treating those persons as if they were stateless.

2. Nothing in the present draft articles precludes States from treating persons concerned, who have become stateless as a result of the succession of States, as nationals of the State concerned whose nationality they would be entitled to acquire or retain, if such treatment is beneficial to those persons.

Commentary

(1) Paragraph 1 safeguards the right of States other than the State which has attributed its nationality not to give effect to a nationality attributed by a State concerned in disregard of the requirement of an effective link. International law cannot, on its own, invalidate or correct the effects of national legislation on the nationality of individuals, but it allows "some control of exorbitant attributions by States of their nationality, by depriving them of much of their international effect", because "the determination by each State of the grant of its own nationality is not necessarily to be accepted internationally without question". 97/ In the final analysis, although nationality pertains essentially to the internal law of States, the general principles of the international law of nationality constitute limits to the discretionary power of States. 98/

(2) The need to "draw a distinction between a nationality link that is *opposable* to other sovereign States and one that is not, notwithstanding its validity within the sphere of jurisdiction of the State [in question]" 99/ has

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97/ *Oppenheim's International Law*, op. cit. (note 19 above), p. 853.

98/ It is within this meaning that part of the doctrine refers to the negative role of international law in matters of nationality. See Rezek, op. cit. (note 28 above), p. 371; Paul Lagarde, *La nationalité francaise*, Paris, Dalloz, 1975, p. 11; Jacques de Burlet, "De l'importance d'un 'droit international coutumier de la nationalité'", *Revue critique de droit international privé*, 1978, vol. 67, p. 307 et seq. See also paragraph (4) of the commentary to the preamble.

99/ Rezek, op. cit. (note 28 above), p. 357.

led to the development of the theory of effective nationality. 100/ As regards the specific situation of a succession of States, it is also widely accepted that "[t]here must be a sufficient link between the successor State and the persons it claims as its nationals in virtue of the succession, and the sufficiency of the link might be tested if the successor State attempted to exercise a jurisdiction over those persons in circumstances disapproved of by international law, or attempted to represent them diplomatically; provided, that is, there is some State competent to protest on behalf of the persons concerned". 101/

(3) A number of writers 102/ on the topic of the succession of States who hold the above view that the successor State may be limited in its discretion to extend its nationality to persons who lack an effective link with the territory concerned base their argument on the decision of the International Court of Justice in the Nottebohm case. 103/ In its judgment, the Court indicated some elements on which an effective nationality can be based. As the Court said, "[d]ifferent factors are [to be] taken into consideration, and their importance will vary from one case to the next: the habitual residence

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100/ See Brownlie (1990), op. cit. (note 45 above), p. 397 et seq.; H.F. van Panhuys, The Role of Nationality in International Law, Leyden, Sijthoff, 1959, p. 73 et seq.; Paul Weis, Nationality and Statelessness in International Law, second edition, Germantown, Maryland, Sijthoff-Noordhoff, 1979, p. 197 et seq.; de Burlet (1978), op. cit. (note 98 above), p. 323 et seq. For Charles Rousseau, the theory of effective nationality is "a specific aspect of the more general theory of effective legal status in international law". (Rousseau, op. cit. (note 70 above), p. 112).

101/ O'Connell (1967), op. cit. (note 44 above), p. 499.

102/ See, e.g. Ruth Donner, The Regulation of Nationality in International Law, 2nd ed. (Irvington-on-Hudson, New York, Transnational Publishers, 1994), p. 260; O'Connell (1967), op. cit. (note 44 above), p. 510; and Karl Zemanek, "State Succession After Decolonization", Recueil des cours ... 1965-III, vol. 116, p. 272.

103/ According to the Court, "a State cannot claim that the rules [pertaining to the acquisition of its nationality that it has laid down] are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States". I.C.J. Reports, 1955, p. 23.

of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc". 104/ It is to be noted, however, that the Italian-United States Conciliation Commission, in the Flegenheimer case (1958), concluded that it was not in its power to deny the effects at the international level of a nationality conferred by a State, even without the support of effectivity, except in cases of fraud, negligence or serious error. 105/ Moreover, the judgment in the Nottebohm case only dealt with the admissibility of a claim for diplomatic protection and did not imply that a person could be generally treated as stateless.

(4) In practice, different tests for determining the competence of the successor State to attribute its nationality on certain persons have been considered or applied, such as habitual residence or birth. Thus, e.g. the Peace Treaties after the First World War as well as other instruments used as a basic criterion that of habitual residence. 106/ But, as has been pointed out, "[a]lthough habitual residence is the most satisfactory test for determining the competence of the successor State to impress its nationality on specified persons, it cannot be stated with assurance to be the only test admitted in international law". 107/ Some authors have favoured the test of birth in the territory affected by the succession as proof of an effective

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104/ Ibid., p. 22. The Court's judgment admittedly elicited some criticism. It has been argued, in particular, that the Court had transferred the requirement of an effective connection from the context of dual nationality to a situation involving only one nationality and that a person who had only one nationality should not be regarded as disentitled to rely on it against another State because he or she had no effective link with the State of nationality but only with a third State.

105/ See United Nations, Reports of International Arbitral Awards, vol. XIV, p. 327.

106/ The Treaties of Peace of Saint-Germain-en-Laye and of Trianon, however, adopted the criterion of pertinenza (indigénat), which did not necessarily coincide with habitual residence.

107/ O'Connell (1967), op. cit. (note 44 above), p. 518.

link with the successor State. 108/ In recent dissolutions of States in Eastern Europe, the main accent was often put on the "citizenship" of the component units of the federal State that disintegrated, which existed in parallel to federal nationality. 109/

(5) The term "link" in paragraph 1 of article 19 is qualified by the adjective "effective". The intention was to use the terminology of the International Court of Justice in the Nottebohm case. 110/ Although the question of non-opposability of nationality not based on an effective link is a more general one, the scope of application of paragraph 1 is limited to the non-opposability of a nationality acquired or retained following a succession of States.

(6) Paragraph 2 deals with the problem that arises when a State concerned denies a person concerned the right to retain or acquire its nationality by means of discriminatory legislation or an arbitrary decision and, as a consequence, such person becomes stateless. As already stated, international law cannot correct the deficiencies of internal acts of a State concerned, even if they result in statelessness. This, however, does not mean that other States are simply condemned to a passive role. There have indeed been instances where States did not recognize any effect to the legislation of another State aimed at denying its nationality to certain categories of persons, albeit in a context other than a succession of States: e.g. such was the position of the Allies with respect to the Nazi Citizenship Law denationalizing German Jews. 111/

108/ In the case of Romana v. Comma, in 1925, the Egyptian Mixed Court of Appeal relied on this doctrine when it held that a person born in Rome and resident in Egypt became, as a result of the annexation of Rome in 1870, an Italian national. Annual Digest and Reports of Public International Law Cases, vol. 3, No. 195.

109/ See Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paras. (5) to (10) of the commentary to draft article 20 proposed by the Special Rapporteur.

110/ It must be noted that, in the English version of the Judgment, the Court also uses the expression "genuine connection", the equivalent of which is "rattachement effectif" in the French version. I.C.J. Reports, 1955, p. 23.

111/ See Lauterpacht, op. cit. (note 53 above).

(7) The provision of paragraph 2 is, however, not limited to the case where statelessness results from an act of a State concerned. It also applies where a person concerned has, by his or her negligence, contributed to such situation.

(8) The purpose of paragraph 2 is to alleviate, not to further complicate, the situation of stateless persons. Accordingly, this provision is subject to the requirement that the treatment of such persons as nationals of a particular State concerned be for their benefit, and not to their detriment. In practical terms, this means that other States may extend to these persons a favourable treatment granted to nationals of the State in question. However, they may not, for example, deport such persons to that State as they could do with its actual nationals (provided that there would be legitimate reasons for such action).

PART II. PROVISIONS RELATING TO SPECIFIC CATEGORIES OF SUCCESSION OF STATES

Commentary

(1) The provisions of Part II are divided into four sections devoted to specific categories of succession of States, namely "Transfer of Part of the Territory", "Unification of States", "Dissolution of a State" and "Separation of Part or Parts of the Territory". The identification of the rules governing the distribution of individuals among the States involved in a succession derives in large part from the application of the principle of effective nationality to a specific case of succession of States.

(2) As regards the criteria used for establishing the rules concerning the attribution of the nationality of the successor State, the withdrawal of the nationality of the predecessor State and the recognition of a right of option in Part II, the Commission, on the basis of State practice, has given particular importance to habitual residence. 112/ Other criteria such as the

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112/ See Second report on State succession and its impact on the nationality of natural and legal persons, document A/CN.4/474, paras. 50-81. See also paragraph (4) of the commentary to article 5. As regards the nationality laws of newly independent States, it must be observed that, while some countries applied residence as a basic criterion, others employed criteria such as *jus soli*, *jus sanguinis* and race. See Yasuaki Onuma, "Nationality and Territorial Change: In Search of the State of the Law", *The Yale Journal of World Public Order*, vol. 8 (1981), pp. 15-16; and Jacques de Burlet, *Nationalité des personnes physiques et décolonisation* place of birth or the legal bond with a constituent unit of the predecessor State, however, become significant for the determination of the nationality of persons concerned who have their habitual residence outside the territory of a successor State, in particular when they lose the nationality of the predecessor State as a consequence of the latter's disappearance.

SECTION 1

TRANSFER OF PART OF THE TERRITORY

Article 20

Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State

> When part of the territory of a State is transferred by that State to another State, the successor State shall attribute its nationality to the persons concerned who have their habitual residence in the transferred territory and the predecessor State shall withdraw its nationality from such persons, unless otherwise indicated by the exercise of the right of option which such persons shall be granted. The predecessor State shall not, however, withdraw its nationality before such persons acquire the nationality of the successor State.

Commentary

(1) Section 1 consists of a single article, namely article 20. As indicated by the opening phrase "When part of the territory of a State is transferred by that State to another State", article 20 applies in the case of cessions of territory between two States on a consensual basis. While this phrase refers to standard modes of transfer of territory, the substantive rule embodied in article 20 also applies mutatis mutandis to the situation where a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations, that is, the case of a non-self-governing territory which achieves its decolonization by integration with a State other than the colonial State.

(2) The rule in article 20 is based on the prevailing State practice: 113/ persons concerned who have their habitual residence in the transferred

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(Brussels, Bruylant, 1975), pp. 144-180.

113/ See Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paras. (1) to (27) of the commentary to draft article 17 proposed by the Special Rapporteur.

territory acquire the nationality of the successor State and consequently lose the nationality of the predecessor State, unless they opt for the retention of the latter's nationality. 114/

(3) As to the effective date on which persons concerned who have not exercised the right of option become nationals of the successor State, the Commission believes that it depended on the specific character of the transfer: thus, when a transfer of territory involves a large population, such change of nationality should take effect on the date of the succession; on the contrary, in cases of transfers involving a relatively small population, it may be more practical that the change in nationality take place on the expiration of the period for the exercise of the option. The latter scenario is not inconsistent with the presumption in article 5 of automatic change of nationality on the date of the succession, since the said presumption is rebuttable as explained in the commentary to that article.

(4) Whatever the date of the acquisition of the nationality of the successor State, the predecessor State must comply with its obligation to prevent statelessness under article 4, and shall therefore not withdraw its nationality before such date. 115/

(5) Although there have been a number of instances where the right to opt for the retention of the nationality of the predecessor State was granted only

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114/ See also article 18, paragraph (b) of the 1929 Harvard Draft Convention on Nationality which provided that "[w]hen a part of the territory of a State is acquired by another State [...], the nationals of the first State who continue their habitual residence in such territory lose the nationality of that State and become nationals of the successor State, in the absence of treaty provisions to the contrary, unless in accordance with the law of the successor State they decline the nationality thereof." See American Journal of International Law, vol. 23 Special Suppl. (1929), p. 15.

115/ In the same spirit, article 12 of the Venice Declaration provides that "[t]he predecessor State shall not withdraw its nationality from its own nationals who have been unable to acquire the nationality of a successor State". See Council of Europe document CDL-NAT (96) 7 rev.

The 1961 Convention on the Reduction of Statelessness addresses the problem of statelessness in case of a transfer of territory from a different perspective: article 10, paragraph 2, provides that, should a person concerned become stateless as a result of the transfer, and in the absence of relevant treaty provisions, the successor State shall attribute its nationality to such person.

to some categories of persons residing in the transferred territory, the Commission considers that all such persons should be granted this right, even if this were to entail a progressive development of international law. The Commission does not believe that it is necessary to address in article 20 the question whether there are any categories of nationals of the predecessor State having their habitual residence outside the transferred territory who should be granted a right to opt for the acquisition of the nationality of the successor State. Naturally, the successor State remains free, subject to the provisions of article 8, to offer its nationality to such persons when they have an appropriate connection with the transferred territory.

(6) In the Commission's view, persons concerned who have opted for the nationality of the predecessor State under the terms of article 20, thereby cancelling the presumption in article 5, should be deemed to have retained such nationality from the date of the succession. Thus, there would be no break in the continuity of the possession of the nationality of the predecessor State.

SECTION 2

UNIFICATION OF STATES

Article 21

Attribution of the nationality of the successor State

> Subject to the provisions of article 8, when two or more States unite and so form one successor State, irrespective of whether the successor State is a new State or whether its personality is identical to that of one of the States which have united, the successor State shall attribute its nationality to all persons who, on the date of the succession of States, had the nationality of a predecessor State.

Commentary

(1) Section 2 also consists of one article, namely article 21. As indicated by the phrase "when two or more States unite and so form one successor State, irrespective of whether the successor State is a new State or whether its personality is identical to that of one of the States which have united", article 21 covers the same situations as those described in the commentaries

to the draft articles on succession of States in respect of treaties and in respect of matters other than treaties concerning the case of unification of States. 116/ The Commission finds it preferable to spell out the two possible scenarios in the text of the article itself.

(2) The unification of States envisaged in article 21 may lead to a unitary State, to a federation or to any other form of constitutional arrangement. It must be emphasized, however, that the degree of separate identity retained by the original States after unification in accordance with the constitution of the successor State is irrelevant for the operation of the provision set forth in this article. 117/ It must also be stressed that article 21 does not apply to the establishment of an association of States which does not have the attributes of a successor State. 118/

(3) As the loss of the nationality of the predecessor State or States is an obvious consequence of territorial changes resulting in the disappearance of the international legal personality of such State or States, the main problem addressed in this article is that of the attribution of the nationality of the successor State to persons concerned. In this case, the term "persons concerned" refers to the entire body of nationals of the predecessor State or States, irrespective of the place of their habitual residence.

(4) Accordingly, article 21 provides that, in principle, the successor State has the obligation to attribute its nationality to all persons concerned. As regards, however, a person concerned who has his or her habitual residence outside the territory of the successor State and also has another nationality,

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116/ Yearbook ... 1974, vol. II (Part One), p. 253 et seq., document A/9610/Rev.1, commentary to draft articles 30 to 32; Yearbook ... 1981, vol. II (Part Two), p. 43, document A/36/10, commentary to draft article 15.

117/ This was also the view expressed by the Commission in relation to draft articles 30 to 32 on the succession of States in respect of treaties, Yearbook ... 1974, vol. II (Part One), p. 253, document A/9610/Rev.1, para. (2) of the commentary to those articles.

118/ This is for instance the case of the European Union, despite the fact that the Maastricht Treaty on European Union established a "citizenship of the Union". Under the terms of article 8, "[e]very person holding the nationality of a member State shall be a citizen of the Union". See International Legal Materials, vol. XXXI (1992), p. 259. The Commission notes that the concept of citizenship of the European Union does not correspond to the concept of nationality as envisaged in the present draft articles.

whether that of the State of residence or that of any other third State, the successor State may not attribute its nationality to such person against his or her will. This exception is taken into account by the inclusion of the phrase "Subject to the provisions of article 8".

(5) The provision in article 21 reflects State practice. Where unification has involved the creation of a new State, such State attributed its nationality to the former nationals of all States that merged, as did, for instance, the United Arab Republic in 1958 119/ and Tanzania in 1964. 120/ Where unification has occurred by incorporation of one State into another State which has maintained its international personality, the latter extended its nationality to all nationals of the former. 121/ This was the case, for example, when Singapore joined the Federation of Malaya in 1963. 122/ The

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119/ Article 2 of the Provisional Constitution of the United Arab Republic of 5 March 1958 provided that "[n]ationality of the United Arab Republic is enjoyed by all bearers of the Syrian or Egyptian nationalities; or who are entitled to it by laws or statutes in force in Syria or Egypt at the time this Constitution takes effect." (Text reproduced in Eugène Cotran, "Some legal aspects of the formation of the United Arab Republic and the United Arab States", The International and Comparative Law Quarterly, vol. 8 (1959), p. 374.) This provision was re-enacted in article 1 of the Nationality Law of the United Arab Republic.

120/ According to Part II, Section 4, (1), (2), (3) of the Tanzania Citizenship Act of 10 October 1995, aimed at consolidating the law relating to citizenship, "[e]very person who ... was immediately before Union Day a citizen ... of the Republic of Tanganyika or of the People's Republic of Zanzibar shall be deemed to have become, on Union Day, ... a citizen ... of the United Republic." These provisions encompass persons who became citizens of any of the two predecessor States by birth, registration, naturalization or by descent.

121/ The 1929 Harvard Draft Convention on Nationality only dealt with the case of unification by incorporation. Paragraph (a) of article 18 provided that, "[w]hen the entire territory of a State is acquired by another State, those persons who were nationals of the first State become nationals of the successor State, unless in accordance with the provisions of its law they decline the nationality of the successor State". See American Journal of International Law, vol. 23 (Special Suppl.) (1929), p. 15. The comment to this provision stressed that this rule "is applicable to naturalized persons as well as to those who acquired nationality at birth". See ibid., p. 61.

122/ Upon unification, persons who had been citizens of Singapore acquired the citizenship of the Federation, but also maintained the status of citizens of Singapore as one of the units constituting the Federation (Goh Phai Cheng, Citizenship Laws of Singapore (Singapore, Educational

Commission believed that the rule set forth in article 21 is sufficiently broad as to cover the obligations of a successor State under both scenarios.

(6) The Commission is of the view that article 21 embodies a rule of customary international law. In any event, the successor State, which after the date of the succession, is the only remaining State concerned cannot conclude an agreement with another State concerned which would depart from the above provision. It would be, moreover, difficult to imagine how the successor State could "give effect to the provisions of Part I" in a different manner.

SECTION 3

DISSOLUTION OF A STATE

Article 22

Attribution of the nationality of the successor States

When a State dissolves and ceases to exist and the various parts of the territory of the predecessor State form two or more successor States, each successor State shall, unless otherwise indicated by the exercise of a right of option, attribute its nationality to:

(a) persons concerned having their habitual residence in its territory; and

(b) subject to the provisions of article 8:

(i) persons concerned not covered by subparagraph (a) having an appropriate legal connection with a constituent unit of the predecessor State that has become part of that successor State;

(ii) persons concerned not entitled to a nationality of any State concerned under subparagraphs (a) and (b) (i) having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last habitual residence in what has become

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Publications), pp. 7-9. See the materials submitted by Singapore.) For other cases of unification by incorporation, namely the incorporation of Hawaii into the United States and the reunification of Germany, see Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paras. (2), and (5) to (6), respectively, of the commentary to draft article 18 proposed by the Special Rapporteur.

the territory of that successor State or having any other appropriate connection with that successor State.

Article 23

Granting of the right of option by the successor States

1. Successor States shall grant a right of option to persons concerned covered by the provisions of article 22 who are qualified to acquire the nationality of two or more successor States.

2. Each successor State shall grant a right to opt for its nationality to persons concerned who are not covered by the provisions of article 22.

Commentary

(1) Section 3 consists of two articles, article 22 and article 23, and applies to the case of a dissolution of States, as distinguished from the case of separation of part or parts of the territory, the latter being the object of section 4. Although it may not always be easy in practice to clearly differentiate between those two situations, such distinction is necessary. When a State disappears by dissolution, its nationality also disappears, while in the case of separation of part of the territory, the predecessor State continues to exist and so does its nationality. 123/

(2) The substantive rules embodied in articles 22 and 23 apply *mutatis mutandis* when the various parts of the predecessor State's territory do not become independent States following the dissolution, but are incorporated into other, pre-existing, States. In such case, the obligations spelled out in articles 22 and 23 would become incumbent upon those States.

(3) As the loss of the nationality of the predecessor State is an automatic consequence of dissolution, the issues to be addressed in section 3 are the attribution of the nationality of the successor States to persons concerned and the granting of the right of option to certain categories of persons concerned.

123/ For comparable reasons, the Commission also distinguished between "dissolution" and "separation" when it dealt with the question of succession of States in respect of matters other than treaties. See *Yearbook ... 1981*, vol. II (Part Two), p. 45, document A/36/10, para. (3) of the commentary to draft articles 16 and 17.

(4) The core body of nationals of each successor State is defined in paragraph (a) by reference to the criterion of habitual residence, which is consistent with the presumption in article 4. This criterion, widely accepted by publicists, 124/ was used on a large scale, in particular, to resolve the issue of attribution of nationality after the dissolution of the Austro-Hungarian Monarchy. 125/

(5) In the recent cases of the dissolutions of Yugoslavia and Czechoslovakia, some successor States used the criterion of the "citizenship" of the republics constituting the federation 126/ as the main criterion for determining their nationals, irrespective of their place of habitual residence. 127/ Consequently, some nationals of the predecessor State

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124/ See Onuma, op. cit. (note 112 above), note 5 referring to various commentators.

125/ The effects on nationality of the dismemberment of the Austro-Hungarian Monarchy, involving also the dissolution of the core of the dualist Monarchy, were regulated in a relatively uniform manner. Article 64 of the Peace Treaty of Saint-Germain-en-Laye provided that "Austria admits and declares to be Austrian nationals ipso facto and without the requirement of any formality all persons possessing at the date of the coming into force of the present Treaty rights of citizenship (pertinenza) within Austrian territory who are not nationals of any other State." (Laws concerning nationality, op. cit., p. 586.) Similar provisions are contained in article 56 of the Peace Treaty of Trianon concerning the acquisition of Hungarian nationality. (Ibid., p. 587.) Concerning the ambiguities of the concept of "pertinenza", see note 104 above.

126/ As pointed out by Rezek, "[i]l y a des fédérations où la nationalité fédérale coexiste avec une allégeance provinciale et l'Etat [fédéré] est parfois autorisé à légiférer sur cette matière. ... [L]a nationalité fédérale n'appara[ît] que comme une conséquence de la nationalité de l'Etat [fédéré], établie suivant les règles dictées par les différentes législatures provinciales." (op. cit. (note 28 above), pp. 342-343).

127/ See article 39 of the Citizenship Act of Slovenia of 5 June 1991 ("Nationalité, minorités et succession d'États dans les pays d'Europe centrale et orientale", documents 1, CEDIN, Paris X-Nanterre, Table ronde, décembre 1993); articles 35 and 37 of the Law on Croat Nationality of 26 June 1991 (ibid.); article 46 of the Yugoslav Citizenship Law (No. 33/96, see the materials submitted by Yugoslavia); article 1 of the Czech Law on Acquisition and Loss of Citizenship of 29 December 1992 (No. 40/1993, Col. of Laws, see the materials submitted by the Czech Republic); article 2 of the Law on Citizenship of the Slovak Republic of 19 January 1993 (No. 40/1993, see the materials submitted by Slovakia); article 26, paragraph 1, of the Citizenship Act of the Former Yugoslav Republic of Macedonia of 12 November 1992 (see Carol Batchelor, Philippe Leclerc, Bo Schack, habitually resident in the territory of a particular successor State were not attributed the latter's nationality. The legislation of the successor States contained separate provisions on the acquisition of their nationality by such persons. 128/ In those instances where they were offered the possibility to acquire the nationality of their State of residence nearly all took advantage of such offer. 129/ Where such possibility was considerably limited, serious difficulties arose in practice. 130/

Citizenship and Prevention of Statelessness Linked to the Disintegration of the Socialist Federal Republic of Yugoslavia (UNHCR, 3 April 1997), p. 21); and article 27 of the Citizenship Act of Bosnia and Herzegovina of 6 October 1992 (ibid., p. 27).

128/ Thus, article 40 of the Citizenship Act of Slovenia of 5 June 1991 provided that "[a] citizen of another republic [of the Yugoslav Federation] that had permanent residence in the Republic of Slovenia on the day of the Plebiscite on the independence and autonomy of the Republic of Slovenia on 23 December 1990 and is actually living there, can acquire citizenship of the Republic of Slovenia, on condition that such a person files an application with the administrative organ competent for internal affairs of the community where he resides ..." ("Nationalité, minorités et succession d'États dans les pays d'Europe centrale et orientale", documents 1, op. cit. (note 127 above)); article 30, paragraph 2, of the Law on Croat Nationality of 26 June 1991 provided that any person belonging to the Croat people who did not hold Croat nationality on the day of the entry into force of the Law but who could prove that he had been legally resident in the Republic of Croatia for at least 10 years, would be considered to be a Croat citizen if he supplied a written declaration in which he declared that he regarded himself as a Croat citizen (ibid.); and article 29 of the Citizenship Act of Bosnia and Herzegovina, as amended in April 1993, provided that all citizens of the former Socialist Federal Republic of Yugoslavia resident on the territory of Bosnia and Herzegovina as of 6 April 1992 became automatically nationals of Bosnia and Herzegovina (see Batchelor, Leclerc, Schack, op. cit. (note 127 above), p. 27).

129/ For instance, the practice of the Czech Republic indicates that nearly all persons concerned habitually resident in its territory who did not acquire Czech nationality *ex lege* on the basis of the criterion of "citizenship" of the constituent unit of the Federation acquired such nationality via optional application. Thus, some 376,000 Slovak nationals acquired Czech nationality in the period from 1 January 1993 to 30 June 1994, mostly by option under article 18 of the Czech Law on Acquisition and Loss of Citizenship. The outcome was not substantially different from what would have resulted from the use of the criterion of habitual residence. See Report of the Experts of the Council of Europe on the Citizenship Laws, op. cit. (note 35 above), para. 22 and note 7.

130/ Batchelor, Leclerc, Schack, op. cit. (note 127 above), pp. 4 et seq.

(6) Having examined State practice, including most recent developments, the Commission reaffirmed the importance of the criterion of habitual residence and decided to resort to "citizenship" of a constituent unit of a State only with respect to persons residing outside the territory of a particular successor State. In the same vein, article 8, paragraph (a), of the Venice Declaration, confirmed the rule that "[i]n all cases of State succession, the successor State shall grant its nationality to all nationals of the predecessor State residing permanently on [its] territory." 131/

(7) Paragraph (b) sets out rules for the attribution of the nationality of a successor State to persons concerned having their habitual residence outside its territory.

(8) The obligation of a successor State to attribute its nationality to such persons, as well as its right to do so, is of course limited by the provisions of article 8, as indicated in the chapeau of paragraph (b). Subparagraph (i) deals with persons concerned who have their habitual residence either in a third State or in another successor State. The criterion used is "an appropriate legal connection with a constituent unit of the predecessor State" that has become part of a particular successor State. It goes without saying that this criterion can only be used where a bond of a legal nature between constituent units of the predecessor State and persons concerned existed under the internal law of that State. As discussed above, this was mostly the case of certain federal States. 132/

(9) Where subparagraph (i) is applicable, the majority of persons concerned having their habitual residence outside the territory of a particular successor State will fall under this category and subparagraph (ii) will come into play rather exceptionally, i.e. with respect to persons not already covered by subparagraph (i).

(10) Subparagraph (ii) only deals with persons concerned who have their habitual residence in a third State, i.e. who, on the date of the succession of States, had their habitual residence outside the territory of the predecessor State. The criteria referred to in subparagraph (ii) are those which were most often used in State practice, namely place of birth and place

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131/ Council of Europe document CDL-NAT (96) 7 rev.

132/ See note 126 above.

of the last habitual residence in the territory of the predecessor State. The Commission, however, did not want to exclude the use of other criteria, as indicated by the phrase "or having any other appropriate connection with that successor State." It emphasized, at the same time, that the use of any such criteria must be consistent with the general obligation of non-discrimination under article 15.

(11) Article 22 does not address the question of the mode of attribution by the successor State of its nationality. A successor State may fulfil its obligation under this provision either by means of automatic attribution of its nationality to persons concerned or by providing for the right of these persons to acquire such nationality upon option.

(12) The application of the criteria in article 22 may result in a person concerned being qualified to acquire the nationality of more than one successor State. In such case, the attribution of nationality will depend on the option of such person, as indicated in the chapeau of article 22. Moreover, paragraph (b) is subject to the provision in article 8 whereby a State is prohibited from attributing its nationality to persons concerned having their habitual residence outside its territory against their will. Accordingly, the obligation of a State under paragraph (b) is to be implemented either through an "opting-in" procedure or by ex lege attribution of its nationality with an option to decline ("opting-out" procedure).

(13) Paragraph 1 of article 23 provides for the right of option of persons concerned who are qualified to acquire the nationality of two, or, in certain cases, even more than two, successor States. Such "double qualification" may occur, for instance, when a person concerned habitually resident in one successor State had, prior to the dissolution, the "citizenship" of a constituent unit of the predecessor State which became part of another successor State. There are several recent examples of State practice in which a right of option was granted in such circumstances. 133/ This may also occur

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133/ Article 3, paragraph 1, of the Law on Citizenship of the Slovak Republic provided that every individual who was on 31 December 1992 a citizen of the Czech and Slovak Federal Republic and did not acquire the citizenship of Slovakia ipso facto, had the right to opt for the citizenship of Slovakia. It was mainly addressed to those persons who, by virtue of the Czech Law, became ex lege Czech nationals but were habitual residents of Slovakia. (See the materials submitted to the Secretariat by Slovakia.) Similarly, article 18 of the Czech Law on Acquisition and Loss of Citizenship set out the

when a person concerned habitually resident in a third State was born in the territory which became part of one successor State but also has an appropriate connection, such as family ties, with another successor State. Article 23, paragraph 1, is not meant to limit the freedom of the successor States to grant the right of option to additional categories of persons concerned.

(14) Paragraph 2 deals with persons concerned who have their habitual residence in a third State and who are not covered by the provisions of article 22, paragraph (b), such as those who acquired the nationality of the predecessor State by filiation or naturalization and were never residents thereof. Unless they have the nationality of a third State, these persons would become stateless. The purpose of the option envisaged under paragraph 2, however, is not limited to the avoidance of statelessness, a problem which might be resolved on the basis of article 11, paragraph 2. Its purpose is, furthermore, to enable such persons to acquire the nationality of at least one successor State, thus giving effect to the right to a nationality as embodied in article 1.

SECTION 4

SEPARATION OF PART OR PARTS OF THE TERRITORY

Article 24

Attribution of the nationality of the successor State

When part or parts of the territory of a State separate from that State and form one or more successor States while the predecessor State continues to exist, a successor State shall, unless otherwise indicated by the exercise of a right of option, attribute its nationality to:

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conditions for the optional acquisition of Czech nationality by persons habitually resident in the Czech Republic who acquired _ex lege_ the Slovak nationality. (See the materials submitted to the Secretariat by the Czech Republic.) Another example is the Yugoslav Citizenship Law (No. 33/96). In addition to basic provisions concerning the _ex lege_ acquisition of nationality, article 47 stipulated that "Yugoslav citizenship may be acquired by any citizen of the Socialist Federal Republic of Yugoslavia who was a citizen of another ... republic [of the Federation] .. whose residence was in the territory of Yugoslavia on the date of the proclamation of the Constitution." (See the materials submitted to the Secretariat by Yugoslavia.)

(a) persons concerned having their habitual residence in its territory; and

(b) subject to the provisions of article 8:

  (i) persons concerned not covered by subparagraph (a) having an appropriate legal connection with a constituent unit of the predecessor State that has become part of that successor State;

  (ii) persons concerned not entitled to a nationality of any State concerned under subparagraphs (a) and (b) (i) having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last habitual residence in what has become the territory of that successor State or having any other appropriate connection with that successor State.

Article 25

Withdrawal of the nationality of the predecessor State

1. The predecessor State shall withdraw its nationality from persons concerned qualified to acquire the nationality of the successor State in accordance with article 24. It shall not, however, withdraw its nationality before such persons acquire the nationality of the successor State.

2. Unless otherwise indicated by the exercise of a right of option, the predecessor State shall not, however, withdraw its nationality from persons referred to in paragraph 1 who:

(a) have their habitual residence in its territory;

(b) are not covered by subparagraph (a) and have an appropriate legal connection with a constituent unit of the predecessor State that has remained part of the predecessor State;

(c) have their habitual residence in a third State, and were born in or, before leaving the predecessor State, had their last habitual residence in what has remained part of the territory of the predecessor State or have any other appropriate connection with that State.

Article 26

Granting of the right of option by the predecessor and the successor States

Predecessor and successor States shall grant a right of option to all persons concerned covered by the provisions of articles 24 and 25,

paragraph 2, who are qualified to have the nationality of both the predecessor and successor States or of two or more successor States.

Commentary

(1) Section 4 consists of three articles, i.e. articles 24, 25 and 26, and applies to the case of separation of part or parts of the territory. The distinction between this situation and the case of the dissolution of a State has been explained in the commentary to section 3 above. As stressed by the Commission in its commentaries to draft articles 14 and 17 on succession of States in respect of matters other than treaties, 134/ the case of separation of part or parts of the territory of a State must also be distinguished from the case of the emergence of newly independent States, the territory of which, prior to the date of the succession, had a "status separate and distinct from the territory of the State administering it". 135/

(2) The substantive rules in articles 24 to 26, however, may be applied *mutatis mutandis* in any case of emergence of a newly independent State.

(3) Given the fact that it is sometimes difficult in practice to distinguish between dissolution and separation, the Commission considers it important that the rules applicable in those two situations be equivalent. Accordingly, article 24 on the attribution of the nationality of the successor State is drafted along the lines of article 22.

(4) Paragraph (a) of article 24 sets out the basic rule that the successor State shall attribute its nationality to persons concerned habitually resident in its territory. It must be recalled that an analogous provision regarding the case of separation was included in paragraph (b) of article 18 of the 1929 Harvard Draft Convention on Nationality. 136/

134/ *Yearbook ... 1981*, vol. II (Part Two), pp. 37 and 45, document A/36/10, para. (2) of the commentary to draft article 14 and para. (5) of the commentary to draft article 17.

135/ See the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

136/ This provision stipulated that, "[w]hen a part of the territory of a State ... becomes the territory of a new State, the nationals of the first State who continue their habitual residence in such territory lose the nationality of that State and become nationals of the successor State, in the absence of treaty provisions to the contrary, unless in accordance with the

(5) This rule was applied in practice after the First World War in the case of the establishment of the Free City of Danzig 137/ and the dismemberment of the Austro-Hungarian Monarchy. 138/ More recently, it was applied in the case of the separation of Bangladesh from Pakistan in 1971, 139/ and also when Ukraine 140/ and Belarus 141/ became independent following the disintegration of the Soviet Union. It may also be noted that the criterion of habitual residence was used in practice by some newly independent States. 142/

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law of the successor State they decline the nationality thereof". (American Journal of International Law, vol. 23 (Special Suppl.) (1929), p. 15).

137/ See article 105 of the Peace Treaty of Versailles, Materials on succession of States, op. cit. (note 47 above), p. 489.

138/ See article 70 of the Peace Treaty of Saint-Germain-en-Laye, ibid., p. 496. The rule applied equally to States born from separation and those born from dissolution. It was also embodied in respective article 3 of the Treaty of Versailles with Poland, the Treaty of Saint-Germain-en-Laye with Czechoslovakia, the Treaty of Saint-Germain-en-Laye with the Serb-Croat-Slovene State and the Treaty of Paris with Romania. (G.F. de Martens, Nouveau recueil général de traités, third series, vol. XIII, pp. 505, 514, 524 and 531 respectively.)

139/ Residence in its territory was considered to be the primary criterion for the attribution of the nationality of Bangladesh, regardless of any other considerations. However, non-Bengalese inhabitants of the territory were required to make a simple declaration in order to be recognized as nationals of Bangladesh; they could also opt for the retention of Pakistani nationality. (See M. Rafiqul Islam, "The Nationality Law and Practice of Bangladesh", in Ko Swan Sik (ed.), Nationality and International Law in Asian Perspective (Dordrecht, Martinus Nijhoff, 1990), pp. 5-8.)

140/ Article 2 of the Law on Citizenship of Ukraine No. 1635 XII of 8 October 1991 (see the materials submitted to the Secretariat by Ukraine).

141/ Article 2 of the Law on Citizenship of the Republic of Belarus of 18 October 1991, as amended by the Law of 15 June 1993 and the Proclamation of the Supreme Soviet of the Republic of Belarus of 15 June 1993 (see the materials submitted to the Secretariat by Belarus).

142/ See Onuma, op. cit. (note 112 above), p. 15.

(6) A different criterion was used in the case of the separation of Singapore from the Federation of Malaysia in 1965, namely that of the "citizenship" of Singapore as a component unit of the Federation, which existed in parallel to the nationality of the Federation. 143/ Yet another criterion, the place of birth, was applied in the case of the separation of Eritrea from Ethiopia in 1993, 144/ probably inspired by the earlier practice of a number of newly independent States. 145/

(7) As it did in article 22 with respect to the case of dissolution, the Commission decided to resort to the criterion of habitual residence for the determination of the core body of the population of a successor State. In so doing, it took into consideration both the prevailing practice as well as the drawbacks of the use of other criteria to this end, such as rendering a considerable population alien in its homeland. 146/

143/ Goh Phai Cheng, op. cit. (note 122 above), p. 9. Comparable criteria were also used by some newly independent States in order to define the core body of their nationals during the process of decolonization. See de Burlet (1975), op. cit., p. 120, who makes reference to "nationalités spéciales" ... créées en vue d'une indépendance future [qui] n'étaient destinées à s'épanouir pleinement qu'avec cette indépendance". See also pp. 124 and 129. See further the example of the Philippines cited in Onuma, op, cit. (note 112 above), note 96.

144/ See Eritrean Nationality Proclamation No. 21/1992 of 6 April 1992 (Text in Eritrea - Referendum of Independence, April 23-25, 1993 (African-American Institute), pp. 80-84).

145/ For examples of such practice, see Onuma, op. cit., pp. 13-14, and the Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paras. (15) to (18) of the commentary to draft article 23 proposed by the Special Rapporteur.

146/ See Onuma, op. cit. (note 112 above), p. 29.

(8) As regards paragraph (b), it was included in article 24 for reasons similar to those leading to the inclusion of paragraph (b) in article 22. 147/ The commentary to the latter provision is therefore also relevant to paragraph (b) of article 24.

(9) Paragraph 1 of article 25 deals with the withdrawal of the nationality of the predecessor State as a corollary to the acquisition of the nationality of the successor State. This provision is based on State practice which, despite some inconsistencies, indicates that such withdrawal has been to a large extent an automatic consequence of the acquisition by persons concerned of the nationality of a successor State. 148/ The withdrawal of the nationality of the predecessor State is subject to two conditions. First, that persons qualified to acquire the nationality of the successor State did not opt for the retention of the nationality of the predecessor State. This condition is spelled out in the chapeau of article 24 to which article 25, paragraph 1 refers. Second, that such withdrawal shall not occur prior to the effective acquisition of the successor State's nationality. The purpose of this condition is to avoid statelessness, even if only temporary, which could result from a premature withdrawal of nationality. 149/

147/ See paragraphs (7) to (10) of the commentary to section 3 above. For the practice relating to the use of the criterion referred to in subparagraph (b) (i) of article 24, see note 130 above. For the use of the criterion of the place of birth listed in subparagraph (ii), see Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paras. (5) and (6) of the commentary to draft article 23 proposed by the Special Rapporteur. See also article 2, paragraph (2), of the Law on Citizenship of Ukraine, stipulating that the citizens of Ukraine include "persons who are ... permanent residents in another country provided they were born in Ukraine or have proved that before leaving for abroad, they had permanently resided in Ukraine, who are not citizens of other States and not later than five years after enactment of this Law express their desire to become citizens of Ukraine" (see the materials submitted to the Secretariat by Ukraine).

148/ For examples from State practice, see Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paras. (1) to (8) of the commentary to draft article 24 proposed by the Special Rapporteur. As regards the doctrine, see note 136 above.

149/ See also article 12 of the Venice Declaration which prohibits the predecessor State from withdrawing its nationality from its own nationals who have been unable to acquire the nationality of a successor State. Council of Europe document, CDL-NAT (96) 7 rev.

(10) Paragraph 2 of article 25 lists the categories of persons concerned who are qualified to acquire the nationality of the successor State but from whom the predecessor State shall not withdraw its nationality, unless they opt for the nationality of the successor State. The criteria used for the determination of these categories of persons are the same as those in article 24.

(11) Article 26 deals with the right of option. There are numerous cases in State practice where a right of option was granted in case of separation of part or parts of the territory. 150/

(12) Article 26 covers both the option between the nationalities of the predecessor State and a successor State as well as the option between the nationalities of two or more successor States. Contrary to what is provided in article 20 with respect to a transfer of territory, in the case of separation of part or parts of the territory, the right of option for the retention of the nationality of the predecessor State is not envisaged for all persons concerned qualified to acquire the nationality of the successor State. This right is limited to those persons who, at the same time, fulfil one of the criteria in article 24 and one of those in article 25, paragraph 2. This would be, for instance, the case of a person concerned habitually resident in a third State who was born in the territory of what became a successor State but before leaving for abroad had his or her last habitual residence in the territory that has remained part of the predecessor State.

(13) Similarly, the right of option between the nationalities of two or more successor States has to be granted only to persons concerned who, by virtue of the criteria in article 24, are qualified to acquire the nationality of more than one successor State. Leaving aside the case where the criterion referred to in subparagraph (b) (i) would be applicable, the right of option is only envisaged for some persons concerned who are habitually resident in a third State.

(14) As in the case of article 23, article 26 is not meant to limit the freedom of the States concerned to grant the right of option to additional categories of persons concerned.

150/ See Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paras. (1) to (5) of the commentary to draft article 25 proposed by the Special Rapporteur.

CHAPTER V

STATE RESPONSIBILITY

A. Introduction

49. At its first session, in 1949, the Commission selected State responsibility among the topics which it considered suitable for codification. In response to General Assembly resolution 799 (VIII) of 7 December 1953 requesting the Commission to undertake, as soon as it considered it advisable, the codification of the principles of international law concerning State responsibility, the Commission, at its seventh session in 1955, decided to begin the study of State responsibility and appointed F.V. Garcia Amador as Special Rapporteur for the topic. At the next six sessions of the Commission, from 1956 to 1961, the Special Rapporteur presented six successive reports dealing on the whole with the question of responsibility for injuries to the persons or property of aliens. 151/

50. The Commission, at its fourteenth session, in 1962 set up a subcommittee whose task was to prepare a preliminary report containing suggestions concerning the scope and approach of the future study. 152/

51. At its fifteenth session, in 1963, the Commission, having unanimously approved the report of the Subcommittee, appointed Mr. Roberto Ago as Special Rapporteur for the topic.

52. The Commission, from its twenty-first (1969) to its thirty-first sessions (1979), received eight reports from the Special Rapporteur. 153/

53. The general plan adopted by the Commission at its twenty-seventh session, in 1975, for the draft articles on the topic of "State responsibility" envisaged the structure of the draft articles as follows:

151/ *Yearbook ... 1969*, vol. II, p. 229.

152/ Ibid., p. 229 et seq.

153/ For the eight reports of the Special Rapporteur see: *Yearbook ... 1969*, vol. II, doc. A/CN.4/217 and Add.1, pp. 125-156; *Yearbook ... 1970*, vol. II, doc. A/CN.4/233, pp. 177-198; *Yearbook ... 1971*, vol. II (Part One), doc. A/CN.4/246 and Adds.1-3, p. 199; *Yearbook ... 1972*, vol. II, doc. A/CN.4/264 and Add.1, p. 71; *Yearbook ... 1976*, vol. II (Part One), doc. A/CN.4/291 and Add.1 and 2, pp. 3-55; *Yearbook ... 1977*, vol. II (Part One), doc. A/CN.4/302 and Add.1-3; *Yearbook ... 1978*, vol. II (Part One), doc. A/CN.4/318 and Add.1-4 and *Yearbook ... 1980*, doc. A/CN.4/318/Add.5-7.

Part One would concern the origin of international responsibility; Part Two would concern the content, forms and degrees of international responsibility; and a possible Part Three, which the Commission might decide to include, could concern the question of the settlement of disputes and the implementation of international responsibility. 154/

54. The Commission at its thirty-second session, in 1980, provisionally adopted on first reading Part One of the draft articles, concerning "the origin of international responsibility". 155/

55. At its thirty-first session (1979), the Commission, in view of the election of Mr. Ago as a judge of the International Court of Justice, appointed Mr. Willem Riphagen Special Rapporteur for the topic.

56. The Commission, from its thirty-second (1980) to its thirty-eighth sessions (1986), received seven reports from Mr. Willem Riphagen, 156/ for Parts Two and Three of the topic. 157/

57. At its thirty-ninth session, in 1987, the Commission appointed Mr. Gaetano Arangio-Ruiz as Special Rapporteur to succeed Mr. Willem Riphagen, whose term of office as a member of the Commission had expired on

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154/ Yearbook ... 1975, vol. II, pp. 55-59, doc. A/10010/Rev.1, paras. 38-51.

155/ Yearbook ... 1980, vol. II, (Part Two), pp. 26-63, doc. A/35/10, chap. III.

156/ For the seven reports of the Special Rapporteur, see
Yearbook ... 1980, vol. II (Part One), p. 107, doc. A/CN.4/330;
Yearbook ... 1981, vol. II (Part One), p. 79, doc. A/CN.4/334;
Yearbook ... 1982, vol. II (Part One), p. 22, doc. A/CN.4/354;
Yearbook ... 1983, vol. II (Part One), p. 3, doc. A/CN.4/366 and Add.1;
Yearbook ... 1984, vol. II (Part One), p. 1, doc. A/CN.4/380;
Yearbook ... 1985, vol. II (Part One), p. 3, doc. A/CN.4/389; and
Yearbook ... 1986, vol. II (Part One), p. 1, doc. A/CN.4/397 and Add.1.

157/ At its thirty-fourth session (1983), the Commission referred draft articles 1 to 6 of Part Two to the Drafting Committee. At its thirty-seventh session (1985), the Commission decided to refer articles 7 to 16 of Part Two to the Drafting Committee. At its thirty-eighth session (1986), the Commission decided to refer draft articles 1 to 5 of Part Three and its annex to the Drafting Committee.

31 December 1986. The Commission, from its fortieth (1988) to its forty-eighth (1996) sessions, received eight reports from Mr. Arangio-Ruiz. 158/

58. At the conclusion of its forty-seventh session, the Commission had provisionally adopted, for inclusion in Part Two, draft articles 1 to 5 159/ and articles 6 (Cessation of wrongful conduct), 6 bis (Reparation), 7 (Restitution in kind), 8 (Compensation), 10 (Satisfaction), 10 bis (Guarantees of non-repetition), 160/ 11 (Countermeasures by an injured State), 13 (Proportionality) and 14 (Prohibited countermeasures). 161/ It had furthermore received from the Drafting Committee a text for article 12 (Conditions relating to resort to countermeasures), on which it deferred

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158/ For the eight reports of the Special Rapporteur, see Yearbook ... 1986, vol. II (Part One), p. 6, doc. A/CN.4/416 and Add.1; Yearbook ... 1990, vol. II (Part One), doc. A/CN.4/425 and Add.1; Yearbook ... 1991, vol. II (Part One), doc. A/CN.4/440 and Add.1; doc. A/CN.4/444 and Add.1-3; doc. A/CN.4/453 and Add.1 and Corr.1-3 and Add.2 and 3; doc. A/CN.4/461 and Add.1 and 2; doc. A/CN.4/469 and Corr.1 (English only) and Add.1 and 2 and A/CN.4/476 and Corr.1 (English only) and Add.1. At its forty-first session (1989), the Commission referred to the Drafting Committee draft articles 6 and 7 of Chapter Two (legal consequences deriving from an international delict) of Part Two of the draft articles. At its forty-second session (1990), the Commission referred draft articles 8, 9 and 10 of Part Two to the Drafting Committee. At its forty-fourth session (1992) the Commission referred to the Drafting Committee draft articles 11 to 14 and 5 bis for inclusion in Part Two of the draft articles. At its forty-fifth session (1993), the Commission referred to the Drafting Committee draft articles 1 to 6 of Part Three and the annex thereto. At its forty-seventh session (1995), the Commission referred to the Drafting Committee articles 15 to 20 of Part One dealing with the legal consequences of internationally wrongful acts characterized as crimes under article 19 of Part One of the draft articles and new draft article 7 to be included in Part Three of the draft.

159/ For the text of articles 1 to 5 (para. 1), with commentaries, see Yearbook ... 1985, vol. II (Part Two), pp. 24 et seq.

160/ For the text of article 5, para. 2, and articles 6, 6 bis, 7, 8, 10 and 10 bis, with commentaries, see Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/48/10), pp. 132 et seq.

161/ For the text of articles 11, 13 and 14, see ibid., Forty-ninth Session, Supplement No. 10 (A/49/10), footnote 362. Article 11 was adopted by the Commission on the understanding that it might have to be reviewed in the light of the text that would eventually be adopted for article 12 (see ibid., para. 352).

action. 162/ At its forty-seventh session, the Commission had also provisionally adopted, for inclusion in Part Three, article 1 (Negotiation), article 2 (Good offices and mediation), article 3 (Conciliation), article 4 (Task of the Conciliation Commission), article 5 (Arbitration), article 6 (Terms of reference of the Arbitral Tribunal), article 7 (Validity of an arbitral award) and Annex, article 1 (The Conciliation Commission) and article 2 (The Arbitral Tribunal).

59. At the forty-eighth session of the Commission, Mr. Arangio-Ruiz announced his resignation as Special Rapporteur. The Commission completed the first reading of the draft articles of Parts Two and Three on State responsibility and decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles provisionally adopted by the Commission on first reading, 163/ through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 1998.

60. At its forty-ninth session, the Commission established a Working Group on State Responsibility to address matters dealing with the second reading of the topic. 164/ The Commission also appointed Mr. James Crawford as Special Rapporteur.

61. At its fifty-second session, the General Assembly recommended that, taking into account the comments and observations of Governments, whether in writing or expressed orally in debates in the Assembly, the International Law Commission should continue its work on the topics in its current programme, including State responsibility, and recalled the importance for the Commission of having the views of Governments on the draft articles on State responsibility adopted on first reading by the Commission at its forty-eighth session, in 1996.

162/ See ibid., para. 352.

163/ Report of the Commission on the work of its forty-eighth session Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), pp. 125-151. For the text of article 42, para. 3, and articles 47, 48 and 51 to 53, with commentaries, see ibid., pp. 152 et seq.

164/ For the guidelines on the consideration of this topic on second reading adopted by the Commission on the recommendation of the Working Group, see Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), para. 161.

62. At its fiftieth session, the Commission had before it the first report of Mr. Crawford, the Special Rapporteur. The report dealt with general issues relating to the draft, the distinction between "crimes" and "delictual responsibility", and articles 1 to 15 of Part One of the draft. 165/ The Commission also had before it comments by Governments on the draft articles provisionally adopted by the Commission on first reading. 166/ After having considered articles 1 to 15 *bis*, the Commission referred them to the Drafting Committee.

63. At the same session, the Commission took note of the report of the Drafting Committee on articles 1, 3, 4, 7, 8, 8 *bis*, 9, 10, 15, 15 *bis* and A. The Commission also took note of the deletion of articles 2, 6 and 11 to 14.

B. Consideration of the topic at the present session

64. At its present session, the Commission had before it comments and observations received from Governments on the draft articles provisionally adopted on first reading (A/CN.4/488 and Add.1-3 and A/CN.4/492) and the second report of the Special Rapporteur, Mr. James Crawford (A/CN.4/498 and Add.1-4). That report continued the task, begun in 1998, of considering the draft articles in the light of comments of Governments and developments in State practice, judicial decisions and literature. The Commission considered the report at its 2566th to 2571st, 2573rd to 2574th, 2576th to 2578th, 2587th to 2592nd and 2599th to 2600th meetings, held from 4 to 28 May, 15 to 23 June and 8 to 9 July 1999.

65. The Commission decided to refer the following draft articles to the Drafting Committee: 16 to 18 (1) and (2), and 19 (1), at its 2570th meeting, on 11 May; 18 (3) to (5), and 20 to 26 *bis*, at its 2574th meeting, on 19 May; 27 to 28 *bis*, at its 2578th meeting, on 28 May; 29, at its 2588th meeting, on

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165/ A/CN.4/490 and Add.1-2 and Add.2/Rev.1 (French only), Add.2/Corr.1 (Arabic, Chinese, English, Russian and Spanish only), Add.3-4 and Add.4/Corr.1, and Add.5-6.

166/ A/CN.4/488 and Add.1-3.

16 June; 29 bis and 29 ter (1), at its 2589th meeting, on 17 June; 34 bis (1) and 35, at its 2591st meeting, on 22 June; 31 to 33, at its 2592nd meeting, on 23 June; and 30, at its 2600th meeting, on 9 July. 167/

66. At its 2605th and 2606th meetings, on 19 July, the Commission took note of the report of the Drafting Committee on articles 16, 18, 24, 25, 27, 27 bis, 28, 28 bis, 29, 29 bis, 29 ter, 31, 32, 33 and 35. The Commission also took note of the deletion of articles 17, 19 (1), 20, 21, 22, 168/ 23, 26 and 34. 169/

1. An overview of the structure of the second report by the Special Rapporteur

67. The Special Rapporteur referred to the response to his first report (A/CN.4/490 and Add.1-7) and to the topic of State responsibility in general both within the Sixth Committee of the General Assembly during its fifty-third session and outside the United Nations.

68. He stated that the discussions in the Sixth Committee had been very constructive. With respect to some outstanding issues, particularly with regard to article 19 of Part One of the draft, the Sixth Committee was awaiting the Commission's conclusions with interest and without prejudgement. He indicated that no specific criticism had been offered of draft articles 1 to 15 bis which had been adopted provisionally by the Drafting Committee and noted that the general view was that they could be approved without major alteration.

69. The Special Rapporteur explained that his 1999 report consisted of five parts. The first, relating to Chapter III of the draft articles, dealt with the breach of an international obligation (A/CN.4/498); the second related to Chapter IV and the implication of a State in the internationally wrongful act

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167/ At its 2591st meeting, on 22 June, the Commission decided to suspend consideration of proposed draft article 30 bis (Non-compliance caused by prior non-compliance by another State) pending a final decision on articles 30, and 47 to 50 dealing with countermeasures.

168/ Article 22, as adopted on first reading, dealt with exhaustion of local remedies. The Special Rapporteur proposed a new text for the provision as article 26 bis. The Drafting Committee decided to reserve discussion on the content of the article.

169/ The Drafting Committee adopted article 34 (Self-defence) as article 29 ter.

of another State (A/CN.4/498/Add.1); the third focused on a range of extremely important questions relating to Chapter V, namely, circumstances precluding wrongfulness (A/CN.4/498/Add.2); the fourth was an annex containing a brief comparative review of the so far unexplored question of interference with contractual rights, a question that was related to Chapter IV of the draft articles (A/CN.4/498/Add.3); and the fifth related to certain questions of principle concerning countermeasures.

2. Chapter III (Breach of an international obligation)

(a) Introduction by the Special Rapporteur of the approach to Chapter III

70. The Special Rapporteur said that Chapter III of Part One of the draft articles, dealing with a breach of an international obligation, sought to elaborate on the basic principle set out in article 3, already provisionally adopted by the Commission, whereby responsibility arose on the basis of two conditions: first, that the conduct in question, whether an act or an omission, was attributable to the State (attribution being dealt with in Chapter II); and secondly, that it constituted a breach by that State of an international obligation. In marked contrast to the literature in national law systems, which often treated the subject of breach quite extensively, the international literature on State responsibility had very little to say on the matter. Consequently, the formulation of Chapter III had constituted something of a pioneering effort by the then Special Rapporteur, Mr. Ago, who had had little more than the work of the Hague Codification Conference on which to base himself. Thus, the fact that more than 20 years after the adoption of most of those articles on first reading it was now possible to criticize them and to suggest alternatives, implied no special criticism of the effort itself. Much in the articles, and more in the commentaries, was of value and should be retained.

71. Nevertheless, of the chapters comprising Part One, Chapter III was the one most criticized by Governments and commentators, on the grounds that it was over-refined, unduly complicated, and sometimes difficult to follow. In dealing with Chapter III it was necessary to penetrate its intellectual world, a world of subtle distinctions and qualifications. While his own treatment of the subject in his second report might itself appear over-refined and complex, that was necessary for a thorough treatment of the issues.

72. Before the articles were discussed individually, mention should be made of some general questions. The first was the basic distinction between primary and secondary obligations. The draft articles assumed the existence of primary obligations generated by international law processes of treaty-making, and of law-making more generally, and concerned themselves with the situation that arose when a State failed to comply with them - in other words it was concerned with the secondary obligation of responsibility arising from breach. Hence, a large part of the subject of breach could be presumed to be inevitably a matter for determination by the primary obligation. More accurately, it was a question of the application of the primary obligation, which lay by definition outside the scope of the draft articles, to a particular factual situation, the result being a determination that a breach had occurred.

73. The distinction between primary and secondary obligations, or even rules, in the field of responsibility was bound to be a difficult one, because there must be some overlap between the two, an overlap that was to be found chiefly in Chapter III. Drawing the distinction involved difficult issues of judgement. If a narrow view was taken, the scope of the rules of State responsibility might dwindle almost to nothing, leaving only the question of reparation and restitution. If, on the other hand, a broad view were taken of the scope of the secondary rules, they would incorporate an enormous amount of primary material. In his view, Chapter III, dealing with the rules of responsibility in relation to breach, strayed too far into the field of the primary obligations.

74. The second general issue was the relationship between Chapters I, III, IV and V. While the relationship between Chapters II and III was clearly articulated in article 3, the question arose how Chapters IV and V fitted into that framework. Chapter IV was concerned with the question to what extent a State was responsible for conduct of its own, and therefore attributable to it - which produced a breach by another State of an obligation of that other State - i.e., with the implication of State A in the internationally wrongful conduct of State B. To speak of the implication of State A in the internationally wrongful conduct of State B itself gave rise to a problem, at least with respect to article 28. If State B was coerced by State A into committing an act which would, in the absence of coercion, be an

internationally wrongful act of State B, then Chapter V might actually give State B a defence: the circumstance of _force majeure_ would preclude the wrongfulness of the act of State B. So a problem already arose with Chapter IV in its treating the conduct of the acting State (State B) as internationally wrongful. Such conduct might not be wrongful, precisely because of Chapter V. Article 3 made no reference either to the issues raised by Chapter IV or to those raised by Chapter V.

75. The Drafting Committee could probably resolve the problem of the relationship between Chapters IV and III. The relationship between Chapters III and V, however, posed a more serious problem of articulation. Chapter III appeared to say that there was a breach of an international obligation whenever a State acted otherwise than in conformity with the obligation. Chapter V, on the other hand, said that a range of circumstances, e.g., distress, _force majeure_ and necessity, precluded wrongfulness. In those circumstances, the State's conduct would therefore not be wrongful. But it was very difficult to say that the State was acting in conformity with the obligation when it was acting in a situation of distress or necessity. It would be more appropriate to say that the State was not acting in conformity with the obligation but that, in the circumstances, it was excused - possibly conditionally - for its failure to do so.

76. The point to be stressed at the present juncture was that Chapters III, IV and V of Part One were somewhat disconnected in comparison with Chapters II and III, which were linked by the basic principle set forth in article 3. That problem might be resolved in the Drafting Committee, or it might prove more fundamental. His provisional view was that the most appropriate approach might be to regard Chapters III, IV and V as a connected treatment of the subject of breach, with Chapter III dealing with general principles; Chapter IV dealing with the special cases where a State's conduct in relation to another State involved a breach even if it would not otherwise do so, in other words, even though it was not a breach under Chapter III alone; and Chapter V dealing with situations where, despite an apparent disconformity, the State was nonetheless justified or excused and there was no breach or, in other terms, no responsibility. The conceptual structure of Part One might

become clearer *if such an approach were adopted. The question whether to* label Chapter V "Circumstances precluding wrongfulness" or "Circumstances precluding responsibility" could be discussed at a later stage.

77. In any event, the best course was to begin by dealing with the existing articles in Chapter III one by one, so as to reveal the thought processes that had led him to the rather startling conclusion that the 11 articles in Chapter III should be rendered down to some five articles with a rather different formulation, albeit broadly similar in content.

(b) Summary of the debate concerning the approach to Chapter III

78. There was broad support for the approach adopted by the Special Rapporteur, namely, the rationalization of the draft articles in Chapter III. It was noted that the Commission was dealing with a very complicated, theoretical part of the topic which nevertheless had to be accommodated to practice. Support was also expressed for the Special Rapporteur's views emphasizing the need for a holistic approach in order to identify the relationships among the different articles and parts of the draft.

79. As to the thorny problem of the relationship between primary and secondary rules, it was noted that the difficulty lay in the lack of an agreed definition of the distinction. The comment was also made that it would be counter-productive to spell out the distinction between them in the text and that it would be better referred to in the commentary. The distinction between primary and secondary rules, it was suggested, also affected the relationship between responsibility and wrongfulness.

80. A comment was also made that the tidying-up exercise undertaken by the Special Rapporteur should not be considered as calling into question all the articles adopted on first reading. The Commission must not lose sight of the fact that each of the draft articles of Chapter III served a special purpose, even if that purpose formed part of the overall purpose of the chapter, whose value was not in doubt as the Special Rapporteur himself indicated in paragraph 4 of his report. In the same context, a view was also expressed that it was preferable for the Commission to retain as far as possible the substance of the draft articles considered on first reading and to change them only if there were very good reasons for doing so. If the Commission wished

to simplify, it could, for example, by merging articles, but not by deleting their substance. That would amount to an oversimplification, which would impoverish the Commission's contribution.

3. Introduction by the Special Rapporteur of article 16 (Existence of a breach of an international obligation) 170/

81. The Special Rapporteur said that the content of article 16 was not problematic and constituted an essential introduction to the chapter but that it concealed some underlying problems.

(a) Conflicting international obligations

82. The first was the problem of conflicting international obligations, where State A had directly conflicting obligations vis-à-vis State B and State C. It had been claimed that in a coherent legal system such conflicts could not occur. At one level that was clearly true. Thus, with respect to any ius cogens or erga omnes obligation, such inconsistencies could not arise. Where there was an apparent contradiction between two peremptory norms, then one must prevail over the other, and legal systems had ways of determining which of the two would prevail.

83. However, the draft articles covered a much wider range of obligations including those arising under bilateral treaties. Consequently, conflicts of obligation might arise that could not be resolved by general legal processes. The Commission reached such a conclusion, in drafting the Vienna Convention of 1969, in its treatment of the problem of the relationship between different treaties. The Commission had then decided that coexisting bilateral - or even, in some circumstances, multilateral - obligations by one State to different States did not result in the invalidity of the underlying treaty, but were to be resolved within the framework of State responsibility.

170/ Text of article 16 proposed by the Special Rapporteur reads as follows:

Existence of a breach of an international obligation

> There is a breach of an international obligation by a State when an act of that State does not comply with what is required of it under international law by that obligation, regardless, of the source (whether customary, conventional or other) or the content of the obligation.

See, A/CN.4/498. For the analysis of this article by the Special Rapporteur see ibid., paras. 5-34.

However, this matter and in particular the issues dealing with non-performance of treaties raised by Special Rapporteur Sir Gerald Fitzmaurice 171/ did not appear to have been taken into account when drafting Chapter III of Part One of State responsibility.

84. A number of Governments had raised the problem of conflicting obligations. In the Special Rapporteur's opinion, two separate cases arose. In the first case, the performance of an obligation by State A to State B would produce responsibility in the relationship between State A and State C, but State A's conduct would in no respect be justified or excused by the coexistence of the obligations. If the obligations were of equal status, State A clearly could not excuse itself as against State C by its obligation to State B, by virtue of the pacta tertiis rule. The outcome was that State A was responsible to State C for its failure to comply. That issue plainly arose for the purposes of Part Two, but seemed to have no effect in the framework of Part One. State A was not responsible to State B because it had complied with the obligation, but it was responsible to State C. The only question was what form, in the circumstances, restitution or reparation should take.

85. In the view of the Special Rapporteur, the position was slightly different, however, where State A sought to rely on the conflict in order to avoid responsibility arising in the first place. Normally it could do so only where the other obligation had a prior character, which was not the case under article 44 of the Vienna Convention. If State A invoked jus cogens, the effect would normally be to invalidate the conflicting obligation: there would no longer be a conflicting obligation and the issue of breach of the void obligation simply would not arise.

86. Thus generally speaking and subject to one qualification, either the problem of conflicting obligations was resolved at a stage prior to the issue of responsibility arising or it related to the question of reparation and restitution. The qualification concerned the possibility of an "occasional conflict" between a State's obligation under a bilateral agreement - or even

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[171] See fourth report of the Special Rapporteur on the law of treaties, Yearbook ... 1959, vol. II.

under general international law - and some superior obligation, that is to say, a conflict between two obligations, intrinsically lawful in themselves, which arose only because of the circumstances of a particular case. This would be discussed in relation to Chapter V.

(b) Relationship between wrongfulness and responsibility

87. The Special Rapporteur explained that article 16 said that there was a breach of an international obligation by a State when an act of that State was not in conformity with what was required of it by that obligation. But there were other circumstances - especially those in Chapter V - which prevented wrongfulness from arising, notwithstanding disconformity. In his second report he analysed the way in which various tribunals faced with that problem had sought to formulate it. The Special Rapporteur's preference was for the formula used by the tribunal in the *Rainbow Warrior* arbitration, which had referred to "the determination of the circumstances that may exclude wrongfulness (and render the breach only apparent)". [172] That was what Chapters III and V, taken together, implicitly produced. Otherwise, a situation would arise where conduct was defined as a breach and simultaneously there was a circumstance precluding wrongfulness. He also stressed that the Commission was dealing with the substantive obligation, not with the entirely separate questions of jurisdiction of tribunals or the admissibility of claims, which were excluded from the scope of the draft as a whole.

(c) Drafting issues and merger of articles

88. The Special Rapporteur explained that his proposed article 16 includes the essential elements of articles 17, paragraph 1 and 19, paragraph 1 adopted on first reading.

89. With regard to the drafting of article 16, the Special Rapporteur favoured replacing the wording "not in conformity with what is required" by some such formulation as "does not comply with". But subject to points of drafting, article 16 should be retained.

90. As to article 17, as adopted on first reading, this contained two separate propositions. The first, contained in paragraph 1, was that an act, which constituted a breach, was internationally wrongful regardless of the origin of the international obligation breached. It was the basic assumption

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[172] United Nations, *Reports of International Arbitral Awards*, vol. 20 (1990), p. 251.

underlying the entire draft, which covered the whole range of international obligations of States, irrespective of whether those obligations arose under general international law, treaties or other law-making processes. That principle had been referred to by the International Court of Justice in the Case concerning the Gabcikovo-Nagymaros Project 173/ and seemed to him to be both right and essentially unchallenged. The draft articles were thus formulating a general law of obligations for the purposes of responsibility, rather than separate rules for treaties and for other sources. The common law, for example, had different rules of responsibility for contracts and for torts, as well as additional categories such as restitution. So while national legal systems could split their law of obligations into subsections, international law had not done that and should not, for a number of reasons.

91. The most important reason was one of principle: the close and complex interrelation between treaty and custom in international law. If there were different rules of obligation for custom and treaties, significant problems of articulation would arise since exactly the same substantive obligation could arise under a treaty and under customary international law. Article 17, paragraph 1, should therefore be retained. In contrast to the reasoning provided for its retention in the commentary, the Special Rapporteur's own view was that the provision was merely an explanation of article 16. He therefore proposed that article 17, paragraph 1, should be combined with article 16 as an important clarification of the latter.

92. With regard to article 17, paragraph 2, this said that the origin of an international obligation breached by a State did not affect the international responsibility arising from the internationally wrongful act of that State. He noted that this was, however, ambiguous. It could be interpreted to mean that, once international responsibility had arisen, it did not matter whether it had arisen by reason of breach of a treaty or by other means. But it could matter, because, for example, under article 40 of the draft articles, the definition of the injured State depended on whether the injury arose from a breach of a treaty or a breach of some other rule. The second interpretation was that the existence or non-existence of a breach was independent of the origin of the obligation. That was plainly wrong. The existence or

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173/ I.C.J. Reports 1997, p. 7, at pp. 38-39, para. 47.

non-existence of a breach could be very much affected by the way in which the obligation had come into being. The Special Rapporteur concluded that article 17, paragraph 2 created more problems than it resolved and he recommended its deletion.

93. Article 19, paragraph 1, was similar to article 17, paragraph 1, inasmuch as it clarified the basic principle set out in article 16 and could thus be combined with that article. It said that an act of a State, which constituted a breach of an international obligation, was an internationally wrongful act, regardless of the subject matter of the obligation breached. That proposition was unchallenged. The reference to subject matter in article 19, paragraph 1 was nonetheless a cause for concern as it was a general term, whereas "content", which he favoured, focused on the specific obligation. Some subject matters that were inherently international were more likely to generate international obligations than others.

94. For the reasons explained above, the Special Rapporteur suggested the merger of articles 16, 17, paragraph 1, and 19, paragraph 1. He also proposed the deletion of article 17, paragraph 2.

4. Summary of the debate on article 16

(a) Conflicting international obligations

95. Support was expressed for the views of the Special Rapporteur on the interrelationship of the law of State responsibility and the law of treaties. The differences between them were also noted. It was said that, to solve the problem of a treaty obligation conflicting with a new peremptory norm of general international law (*jus cogens*), for example, by invoking article 62 of the Vienna Convention on the Law of Treaties on a fundamental change of circumstances was to minimize the overriding importance and solemnity of *jus cogens* embodied in articles 53 and 64 of the Vienna Convention. Moreover, that Convention provided, at the procedural level, different consequences for the invalidity or termination of a treaty arising from a conflict with a norm of *jus cogens*. Furthermore, the law of treaties was concerned with the treaty as a whole and, in the event of any inconsistency with a treaty, the effect of *jus cogens* would be the invalidity of the treaty as a whole. But the most common instances of inconsistency occurred in terms of the performance of the treaty. As the International Court of Justice had rightly noted in the

Case concerning the Gabcikovo-Nagymaros Project, 174/ the law of treaties determined whether there was a treaty, who were the parties to the treaty and in respect of what provisions and whether the treaty was in force. In that sense, the scope of the law of treaties differed from that of the law of State responsibility, even if those two branches of law were indeed closely interrelated.

96. A concern was raised that a problem of conflict of obligations immediately arose if all sources of international law were treated on the same footing. It was suggested that the draft articles should contain a provision setting out a hierarchy of different norms of international law, for example, to include in Chapter V a provision referring to obligation erga omnes or peremptory obligations under international law. In this context, it was said that three categories of rules - obligations under Article 103 of the Charter, jus cogens rules, and rules relating to the concept of international crimes - had a hierarchically higher status than did the normal rules of international law and that international crimes were the highest norm of the international legal order because, while a rule of jus cogens could be amended, modified or derogated from by a new rule of jus cogens, there could be no derogation from the notion of international crimes.

97. The idea that international crimes constituted a third category of rules with superior force, distinct from jus cogens, was, however, disputed. It was said that the concept of international crimes had nothing to do with the hierarchy of norms.

98. It was further suggested that it was not necessary to attempt to tackle the issue of conflicting international obligations in the context of article 16 and that it should be tackled under Chapter V instead. The view was also expressed that the question of the relationship between disconformity with an obligation, wrongfulness and responsibility might be best raised in an introductory text serving as a chapeau to the draft articles as a whole. In this context, it was suggested that it would be profitable to consider the distinctions existing in various national legal systems that involved three levels of analysis. The first level involved focusing on the existence of a rule. The second level involved determining if there was a reason precluding

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174/ I.C.J. Reports 1997. Ibid.

the unlawfulness. The third level involved looking to "subjective" circumstances connected with the mental state of the person or State entity that had committed the act.

(b) Relationship between wrongfulness and responsibility

99. There was strong opposition, albeit not unanimous, to the suggestion for the inclusion of the phrase "under international law" in article 16. There appeared to be general agreement that the inclusion of the phrase would cause problems. Referring to the fragmentation of international law, it was noted that sometimes, a particular act might be a breach under a particular mechanism, but not under another. However, the phrase "under international law" may be interpreted as requiring such mechanisms to broaden the basis of their decisions, contrary to the basic instruments which defined their jurisdiction. Furthermore, it was said that the phrase was superfluous, since the entire set of draft articles fell within the sphere of international law.

100. It was suggested that the phrase "under international law" had two possible effects. Its use could block any involvement of domestic law because the topic was clearly one of international law, but this was already covered by article 4. Secondly, it could help to deal with the problem of conflicting international obligations. The inclusion of "under international law" could indicate that the content of obligations was a systematic question under international law. It was suggested that amending the first part of article 16 could allay concerns about the inclusion of the phrase. It was also suggested that the phrase should be incorporated in the commentary or elsewhere in the draft articles if it were not to be included in article 16.

101. There was support for the Special Rapporteur's suggestion that the terms "subjective" and "objective" should not be applied to the elements of responsibility so as to avoid creating confusion. It was suggested that it would be appropriate to include, as a chapeau for the entire set of draft articles on State responsibility, an introductory text or commentary setting out the methodology and scheme of the articles as a whole and to include a reference in that text to the distinction between the terms "subjective" and "objective" and their different meanings.

(c) Drafting issues and merger of articles

102. Strong support was expressed for the merger of articles 17 and 19, paragraph 1, with article 16. This support was not, however, unanimous. For example, it was suggested that the proposed merger concealed the characteristics of a "breach of an international obligation".

103. Strong support was also expressed for the Special Rapporteur's suggestion that the irrelevance of the source of the international obligation be noted. But, it was also suggested that little would be accomplished by the addition of the words "regardless of the source [...] of the obligation" in article 16. It was suggested that the wording of the proposed new article be changed so as to avoid enumerating the various sources of an international obligation. It was also suggested, in this context, that the comments of the Special Rapporteur on the origin of international obligations appeared to mix up the substance of the obligation and the regime of responsibility. Other comments in this context were that the word "institutional" should be inserted before the words "customary" and "conventional" and that the words "or other" should also be retained to cover unilateral acts and the general principles of law. There was also support for a suggestion made that a reference to the type of obligation, of conduct or result, be added to article 16.

104. Some support was expressed for the replacement of the phrase "is not in conformity with" by "does not comply with" or some other phrase referring to non-compliance or breach.

105. A problem was also identified with the phrase "what is required of it by that obligation". It was said that it was difficult to know who was doing the requiring and what was required. The view was also expressed that the reference standard advocated by the Special Rapporteur, namely, "failure to conform giving rise to a breach of an international obligation" was a difficult one to apply. It was suggested that the words "by that obligation" be replaced by "under that obligation".

106. A view was also expressed that the phrase "when an act of that State does not comply with" should be replaced with "when that State does not comply with" because it was clearer, even though the focus must be on the concept of a specific act of the State. The view was expressed that the brackets should be removed from around the phrase "whether customary, conventional or other", as it was inappropriate to use brackets in a formal legal document.

107. There was strong support for the view that the use in article 16 of the word "origin" was to be preferred to the word "source" on the grounds that the latter term might raise complicated questions of what else could be regarded as a source of international law in addition to customary and conventional law. The same view was taken as to the Spanish version.

108. One view was that article 17 was unnecessary and misleading and said nothing that could not go in the commentary. As a solution to this perceived problem, it was suggested that noting the irrelevance of the source of the international obligation might assist. It was also mentioned that it was useful to include the phrase "or the content of the obligation" because that could solve a further issue, viz. the need to refer in the text to the different obligations - of conduct, result and so forth. Support was given for the proposal of the Special Rapporteur to use the word "content" rather than "subject matter". In relation to articles 17 (1) and (2), it was suggested that it could be made clearer in the commentary that in the event of a breach, the respective provisions of the law of treaties and the law of State responsibility should always be interpreted and applied in concert.

109. Support was also expressed for the Special Rapporteur's proposal on the deletion of article 17, paragraph 2, even though the text was considered, by some, as having historical and academic significance. It was noted most systems of national law distinguished between the concept of obligations assumed by contract and the concept of tort. Yet the question was whether that distinction held good in international law. It was, however, noted that the Commission had not addressed the question whether there should be a distinction concerning responsibility arising from the different sources of an international obligation and that article 17, paragraph 2, confirmed that no such distinction existed in international law. It was thought desirable to record this point in the commentary.

110. There was strong support of the Special Rapporteur's proposal in relation to article 19, paragraph 1. One concern was whether this would be seen as undermining the Commission's earlier decision to defer its consideration of the whole of article 19. It was suggested that it would be preferable to address the question of the "subject matter of the obligation

breached" in the context of article 19. It was also suggested that the words "regardless of the subject matter of the obligation breached" in article 19 (1) be reconsidered.

5. Concluding remarks of the Special Rapporteur on the debate on article 16

111. Summing up the discussion on article 16, the Special Rapporteur noted that despite certain differences of opinion, there appeared to be a fairly large measure of agreement on points of principle, substantive and procedural.

112. Starting with the least controversial points, he noted that there had been no real objection to the deletion of article 17 (2). At all events, the history of article 17 and the underlying principle could be reflected in the commentary, as had been suggested. It was acknowledged that the essential provision of article 17 was that contained in paragraph 1, since the Commission had to elaborate secondary rules applicable to all international obligations, whatever their source.

113. Turning to more controversial questions, he was convinced that article 16 had both an introductory and a normative function and should therefore be retained, together with article 18 (1). He gathered that the Commission was, on the whole, in favour of amalgamating article 16, article 17 (1) and article 19 (1). It was for the Drafting Committee to come up with appropriate wording and in particular to take a decision on the phrase "is not in conformity with what is required of it", "does not comply with what is required of it" or "is in breach of what is required of it".

114. He noted that there had been disagreement about the phrase "under international law", inserted in response to a proposal by France, which was concerned to address the issue of conflict of obligations, and to forge a link between Chapter III and Chapter V, not to draw a distinction between international law and internal law, since that already existed in article 4. Article 16, read with Chapter V, seemed to state, on the one hand, that there was responsibility and, on the other, that there was no wrongfulness. That problem could be solved in different ways, primarily in Chapter V. For the time being, the Drafting Committee could place the phrase in square brackets and revert to it following the debate on Chapter V.

115. With regard to the use of the term "non-compliance" to refer to failure to carry out an obligation not involving a breach of international law, he

agreed that it was vague because it could just as well refer to failure to carry out an obligation that might not involve a breach of international law.

116. Lastly, with regard to article 19 (1), he had preferred the word "content" to the words "subject matter" of the obligation breached because it was more precise. He was convinced that the point made in the paragraph properly belonged in article 16 in the form in which he had proposed it, and that this was entirely without prejudice to the substantive issue raised by article 19, namely, the distinction between "international crimes" and "international delicts". The existence of obligations to the international community was generally acknowledged, but the Commission had still to determine how it would fit that idea into the framework of State responsibility.

6. Introduction by the Special Rapporteur of article 18 (Requirement that the international obligation be in force for the State) 175/

117. The Special Rapporteur noted that article 18, adopted on first reading, dealt generally with the difficult subject of temporal aspects of obligations, namely, when was a breach committed and within what period of time. Paragraph 1 set out the general principle of intertemporal law in the field of State responsibility. Paragraph 2 then set out an exception to that principle involving peremptory norms. Paragraphs 3 to 5 dealt with the intertemporal consequences of breaches having a continuing character or involving composite and complex acts. Since such breaches and acts were dealt with in article 24, the Special Rapporteur indicated that he would discuss paragraphs 3 to 5 in conjunction with article 24.

175/ The text of article 18 proposed by the Special Rapporteur reads as follows:

Requirement that the international obligation be in force for the State

> No act of a State shall be considered internationally wrongful unless it was performed, or continued to be performed, at a time when the obligation in question was in force for that State.

See the Special Rapporteur's analysis A/CN.4/498, paras. 35-51.

118. In the opinion of the Special Rapporteur, the principle outlined in article 18, paragraph 1, was correct: a State could be held responsible for a breach of an international obligation only if the obligation had been in force for the State at the time of the breach.

119. Were there any exceptions to the principle enunciated in article 18, paragraph 1? The 1969 Vienna Convention on the Law of Treaties contained a provision on the effect of a treaty prior to its entry into force for a State: the obligation not to defeat the object and purpose of the treaty. But, he noted, that was an obligation independent of the treaty obligation and thus did not form an exception to the intertemporal principle. It had also been suggested that human rights obligations had a progressive character and that therefore the intertemporal principle did not apply to them. The interpretation of human rights obligations was not, however, the objective of the draft articles, for the reasons outlined in paragraphs 41 et seq. of his second report (A/CN.4/498), and, subject to issues of interpretation, the intertemporal principle applied equally to them.

120. The principle in article 18, paragraph 1, should thus be retained, but he proposed that it be reworded as a guarantee ("No act of a State shall be considered internationally wrongful unless ..."), rather than a conditional statement ("An act of the State ... constitutes a breach ... only if ...") as was the text on first reading.

121. The Special Rapporteur noted that the draft articles did not enunciate the principle that, once the responsibility of a State was engaged, it did not lapse merely because the underlying obligation had terminated. 176/ He proposed to remedy that omission with an article, to be included in Part 2 or 3, that he would propose in due course.

122. The Special Rapporteur further noted that article 18, paragraph 2, dealt with the emergence, subsequent to the occurrence of a breach, of a new peremptory norm requiring that an act, which had previously constituted a breach, actually be performed. The act was thus no longer considered internationally wrongful. The commentary to the article referred to the

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176/ In this context, the Special Rapporteur, referred to both the Case concerning Certain Phosphate Lands in Nauru, I.C.J. Reports, 1992, p. 240, at p. 255, and the Rainbow Warrior arbitration, United Nations, Reports of International Arbitral Awards, vol. 20 (1990), p. 217, at pp. 265-266.

emergence in the nineteenth century of the prohibition of slavery. If, for example, a seizure of slaves occurred at a time when slavery had not been unlawful, then the slaves would have to be returned to the proprietors. But if a peremptory norm prohibiting slavery came into effect, there could obviously be no restoration of slaves.

123. Another possibility suggested by the Special Rapporteur was the emergence of a new peremptory norm that was clearly designated as having retroactive effect. Article 64 of the Vienna Convention, however, assumed that new peremptory norms would not have retroactive effect, and there were no examples to the contrary. Article 18, paragraph 2, appeared to be inconsistent with article 64 of the Vienna Convention on the Law of Treaties.

124. He noted that a third possibility was that, at the time an international obligation was performed, there was a conflict with a peremptory norm, and not necessarily one that had emerged recently. Under the Vienna Convention, in the event of a conflict between a part of a treaty and a peremptory norm, the entire treaty was invalidated. The invalidation of treaties ought to be minimized, however, and there was a need for a principle that would avert conflicts between treaty obligations and the demands of peremptory norms. He proposed to deal with that problem in the context of Chapter V. Since article 18, paragraph 2, confused a number of issues without advancing the question of intertemporal law it should be deleted. The basic principle of intertemporal law should nevertheless be retained and he had proposed a formulation for that in the new text of article 18.

7. Summary of the debate on article 18

125. Broad support was expressed for the proposal of the Special Rapporteur in relation to article 18, paragraph 2. The basic principle elaborated in paragraphs 1 and 2 of article 18 was considered self-evident and did not need to be explained. Agreement was expressed with the view of the Special Rapporteur expressed in paragraph 43 of his second report, that the advisory opinion of the International Court of Justice in the Namibia case 177/ did not violate the principle set forth in article 18 (1) and that the intertemporal

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177/ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, I.C.J. Reports 1971, p. 16, at pp. 31-32, para. 53.

principle did not entail that treaty provisions were to be interpreted as if frozen in time. It was because article 18 (1) was not in conflict with the idea that it was not imperative to delete it; but that was not a reason for retaining it. If it was necessary to retain certain aspects of it for any reason, the new formulation proposed by the Special Rapporteur seemed to merit serious consideration by the Drafting Committee.

126. With respect to the contrast between evolutionary and static interpretations of treaty provisions, it was pointed out that certain terms of a treaty were necessarily open. For instance, if a 1920 treaty provides for a State an obligation to do everything for the "well-being" of the indigenous population of a territory, it would be illogical to say, 50 years later, that "well-being" had to be interpreted according to its 1920 meaning. A term like "well-being" had to be interpreted dynamically. But that was not an issue that had to be taken up in the context of article 18.

127. It was also said that the Special Rapporteur's view of "progressive" or evolutionary interpretation of international human rights obligations went too far. That mode of interpretation was not generally accepted in contrast to other modes of interpretation recognized in the Vienna Convention on the Law of Treaties.

128. In accordance with another view, article 18 (1) adopted on first reading was more complete and clearer than the new article 18 proposed by the Special Rapporteur. That reworked version did not state clearly that only an act of a State, which was not in conformity with an international obligation, could be regarded as an internationally wrongful act. Furthermore, there was no need to state that the act was performed or continued; the important point was that the obligation in question must be in force with respect to the State in question.

129. The deletion of article 18 (2) was broadly supported. It dealt neither with the effect of peremptory norms of international law nor with their content and the commentary to the first version of that provision showed that it envisaged a merely hypothetical case. Furthermore, in paragraph 51 of his second report, the Special Rapporteur pointed out some of the difficulties to which it might lead. Its deletion would simplify the text, to the benefit of those who would have to apply it in future. In any case, it would be better to consider that type of situation in the context of Part Two.

130. Another view that was expressed was that it was necessary to retain the substance of paragraph 18 (2), but that it was acceptable to move it to Chapter V.

8. Concluding remarks of the Special Rapporteur on the debate on article 18

131. Summing up the debate on article 18, the Special Rapporteur noted, with regard to the principle of the intertemporality of international law, that there was broad agreement on retaining article 18 (1), which stated a principle of general application. The Drafting Committee would have to choose between the initial wording and his proposal, which he would not insist on, although he firmly believed that States were entitled to some form of guarantee against the retrospective application of the law in the field of responsibility, except in the case of a lex specialis arrangement. He also stated that no member of the Commission had argued for the retention of article 18 (2) in Chapter III. It would perhaps be found that the provision it contained belonged more appropriately, in some form, in Chapter V. In that context, it need not be limited to the hypothetical case of new peremptory rules.

9. Introduction by the Special Rapporteur of article 20 (Obligations of conduct and result) [178]

(a) Distinction between obligations of conduct and obligations of result

132. The Special Rapporteur pointed out that article 20 and article 21, paragraph 1, as adopted on first reading, set out the distinction between

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[178] The text of article 20 proposed by the Special Rapporteur reads as follows:

Article 20

Obligations of conduct and obligations of result

1. An international obligation requiring a State to adopt a particular course of conduct is breached if that State does not adopt that course of conduct.

2. An international obligation requiring a State to achieve, or prevent, a particular result by means of its own choice is breached if, by the means adopted, the State does not achieve, or prevent, that result.

See, document A/CN.4/498. For an analysis of the article by the Special Rapporteur see, ibid., paras. 52-92.

obligations of conduct and obligations of result, which distinction had gained currency in international law. The distinction derived from civil law systems and, more particularly, from French law, which treated the former as being in the nature of "best efforts" obligations - such as those of a doctor towards a patient - and the latter as being tantamount to guarantees of outcome. The distinction undoubtedly made some difference in terms of the burden of proof, but, on the other hand, the articles under consideration were not concerned with that issue.

133. The Special Rapporteur commented on the significance of the fact that, in borrowing the distinction from French law, the former Special Rapporteur, Mr. Ago, had reversed the consequences that were to be inferred from it. Whereas, in French law, an obligation of conduct was the less stringent of the two, under articles 20 and 21, the obligation of conduct was considered more stringent than the obligation of result. This was because of the emphasis in article 20 on the determinacy of the conduct in question, whereas the original French law distinction was concerned with risk. While, perhaps, merely an intellectual curiosity, it did imply that some uncertainty about the distinction had already arisen at an early stage.

134. A further issue, in the view of the Special Rapporteur, was that the distinction appeared to have no consequences in terms of the rest of the draft articles, and it could therefore be deleted. In that respect it was unlike the distinction between continuing and completed violations, which did have important consequences in that breaches in the former category gave rise, inter alia, to the obligation of cessation.

135. In proposing the deletion of a distinction which, although familiar, was somewhat uncertain and, moreover, did not seem to entail any consequences within the framework of the draft articles, the Special Rapporteur was not proposing that the distinction should not be used at all, but rather that it should be seen as falling within the area of primary rules.

(b) Extended obligations of result

136. Article 21, paragraph 2, established an additional category, which the Special Rapporteur termed "extended obligations of result". Under that paragraph, what was a breach of an international obligation at a specific

moment could later yield a result equivalent to that required under the obligation by virtue of the subsequent conduct of the State, in effect annulling the breach.

137. The Special Rapporteur referred to the ambiguity in the phrase "situation not in conformity" with the result required by an international obligation in paragraph 2. That ambiguity could be illustrated by the aut dedere aut judicare principle in extradition law, which gave the State a choice of either extraditing or trying an individual. If, however, the individual was a national of a State that had a law or a constitutional provision precluding it from extraditing its nationals, and it accordingly refused an extradition request, no breach of the aut dedere aut judicare principle had at that point been committed. The breach arose only at the point when it became clear that the State was not complying with the obligation to submit the case to the proper authorities for prosecution.

138. In such a case, the obligation could be performed in one of two ways, and the exclusion of one way did not in itself amount to a breach. In his view, it was not necessary for that to be spelled out in article 21, paragraph 2. Nor was it the case that such an obligation had to be formulated as an obligation of result: the aut dedere aut judicare principle was in reality an obligation of conduct.

139. In this regard, former Special Rapporteur Mr. Ago had articulated a position in the commentary to article 21 179/ on when a breach of obligation was committed, which appeared to have led to the conclusion that a human rights obligation was breached only when the State failed to offer compensation or redress, not when it engaged in conduct that was inconsistent with the human rights norm. The offering of the compensation was thus seen as the second stage of the extended obligation of result.

140. However, the Special Rapporteur maintained that that was an improper analysis of most obligations in the fields of both human rights and the treatment of aliens. In assuming an obligation not to torture individuals, a State was not undertaking to offer compensation for torture. Rather, it was undertaking not to commit torture: the subsequent offer of compensation could not erase the breach, although it might affect the admissibility of a claim at

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179/ Yearbook ... 1977, vol. II (Part Two), pp. 18-30.

the international level. He referred to the decisions of human rights courts and the Human Rights Committee in which human rights obligations were not held to be breached only at the point when there was a failure to provide reparation. 180/ Instead, in certain circumstances, the mere existence of a law that contradicted those rights was sufficient.

141. It was not impossible to formulate international obligations in such a way that a breach occurred prima facie on a given day yet was removed on the following day if reparation was offered. But that was not the normal way in which international obligations were formulated and, when they were, it was a matter for the primary norm. If States wished to say that they would in no circumstances torture individuals, for example, the draft articles could not require them to reformulate that obligation in another way. In his view, article 21, paragraph 2, together with the commentary, came close to doing precisely that, and should be deleted.

(c) Obligations of prevention

142. Article 23, as adopted on first reading, covered the situation where the result in question was one of prevention of the occurrence of a given event. But there seemed to be no reason to treat obligations of prevention, at least prima facie, as anything other than negative obligations of result. In addition, the view taken in the commentary to article 22, paragraph 2, of the Vienna Convention on Diplomatic Relations, had also been adopted by the International Court of Justice in the Case concerning United States Diplomatic and Consular Staff in Tehran. 181/ In his view, the inference to be drawn from those conflicting interpretations seemed to be that an obligation of prevention was neither per se an obligation of conduct nor an obligation of result. It could be either, depending on the circumstances of the particular case and the formulation of the primary rule. The Trail Smelter 182/ arbitration provided another interesting example. Attempts to force

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180/ See A/CN.4/498, notes 142 and 144.

181/ I.C.J. Reports 1980, p. 3 at p. 30, para. 61.

182/ United Nations, Reports of International Arbitral Awards, vol. 3 (1938 and 1941), p. 1905.

international obligations into one category or another might, in his view, lead to confusion, and he therefore maintained that there was a case for deleting article 23.

(d) Article 20 as proposed by the Special Rapporteur

143. There was a case for deleting all three articles. But the distinction between obligations of conduct and result was well known and could perhaps be retained. The Special Rapporteur thus proposed for discussion a new article 20 amalgamating existing articles 20 and 21, paragraph 1 into one article. Furthermore, the concept of prevention was incorporated as a form of obligation of result, while the notion of extended obligations of result, as contained in former paragraph 2 of article 21, was dropped. In expressing, however, his personal preference for the deletion of the distinction between obligations of conduct, result and prevention from the draft articles altogether, the Special Rapporteur noted that this approach had been favoured by both the French Government and French authors alike.

144. The proposed single article had thus been placed in square brackets, because it might be thought to relate to the classification of primary rules and because its further consequences in terms of the rest of the draft articles remained unclear.

10. Summary of the debate on article 20

(a) Distinction between obligations of conduct and obligations of result

145. Diverging views emerged in the Commission concerning the need to retain the distinction in the draft articles on second reading.

146. The observation was made that the distinction between obligations of result and obligations of conduct had become commonplace in international legal discourse, not only at the academic level but also at that of inter-State relations. However, the view that the concept was practically a classic in civil law systems was an overstatement, resulting from a tendency by some to identify all civil law systems with French law. In German law, for example, the distinction as such had no place, except in connection with labour contracts, as opposed to contracts relating to services.

(i) Utility of the distinction in determining responsibility

147. While the distinction was considered of some use in the interpretation of primary rules in an explanatory, didactic sense, doubts were expressed as

to whether it should be included in a codification of the law of State responsibility, and if so, whether it could be made operational at the level of secondary rules.

148. It was observed that no convincing evidence had been provided to support the view that the existence of a breach was determined by reference to whether the breach was of an obligation of conduct or of result. Even if it was possible clearly to distinguish between the two obligations and the distinction helped to clarify the content of a breach or the moment of its occurrence, that classification was no substitute for the interpretation and application of the primary norms themselves. It was also noted that the distinction was of no relevance regarding the consequences when such obligations, whether of conduct or of result, were breached. Concern was also expressed for the possibility that taking the distinction too seriously could lead to tragically wrong results, as in the case of torture.

149. Furthermore, the view was expressed that while the concepts embodied in those articles might not be alien to international law, they had not attained the level of universal acceptance that would require their codification. Indeed, it was observed that international courts had, in general, rarely made use of the distinction.

150. The view expressed was that articles 20, 21 and 23 were confusing in the extreme and should be deleted, even if the distinction was sometimes found useful at the level of classification. Reference was made, as a possible source of confusion, to the reversal of the effect of the distinction which had been instituted by Special Rapporteur Ago and the Commission in 1976 when transforming it from civil law into a rule of international law, and which was commented upon by the Special Rapporteur in paragraph 58 of his report (A/CN.4/498). It was observed that the confusion that ensued from that inversion was not likely to advance the codification of the topic, all the more so as the two types of obligations constituted a continuum and the decision to place certain obligations in one compartment and not the other rested on a subjective notion of the probability of achieving the intended outcome in a particular field.

151. It was noted further that the deletion of articles 20, 21 and 23 need not be a denial of the utility of the distinction in all cases. Rather it was

based on the view that, since the distinctions were not always useful and were not reflected in the categories contained in Part Two, they need not be articulated in Part One as secondary norms.

152. Other members believed, however, that the distinction drawn between obligations of conduct and of result was a useful one and should be retained. The distinction, while cognitive rather than normative, served as a tool with which to assess the type of obligation, without predetermining its outcome or applying qualitative standards thereto. An instance of a case where the distinction was of value was the issue of reservations to human rights treaties. Thus, the articles of the Vienna Convention on the Law of Treaties which dealt with the effects of reservations largely depended upon it. Another example was provided by article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights, which contained a delicate mix of obligations of conduct and obligations of result.

153. Despite its drawbacks, some form of categorization or refinement was deemed essential. The fact that courts had found the distinction between obligations of conduct and obligations of result useful, even if only occasionally, was an argument against abandoning the distinction. Likewise, the distinction was of particular value to developing countries which did not all have equal means at their disposal to achieve the result required of them.

154. Support was also expressed for clarifying that obligations of conduct were legal obligations and that a failure to exercise due diligence could trigger responsibility. In this regard, it was noted that the distinction did play a significant role in facilitating the answer to at least three important questions: how the breach of an international obligation was committed in any particular instance; whether a breach could be judged to have existed; and when a breach had occurred and was completed.

155. It was queried whether the Special Rapporteur had indeed provided enough examples in positive law to enable the Commission to arrive at a conclusive decision. If the distinction had become commonplace in international law at the doctrinal level, it would be worthwhile searching for further applications of the concept, for example, by considering areas such as the law of the sea, environmental law and diplomatic law. Hence, a preference was expressed for

retaining the text in brackets until the Commission had completed its work on the draft, when it would be able to see whether there were other reasons for retaining the text.

156. In the latter regard, it was observed that the distinction between obligations of conduct and obligations of result could have important implications in connection with the consideration of circumstances precluding wrongfulness (Chapter V of Part One), as well as in connection with the definition of injured States in Part Two, and was of some consequence for the exhaustion of local remedies rule. In the latter regard, it was suggested that the Special Rapporteur's stance on the retention of the distinction was an anticipation of his view on the exhaustion of local remedies (art. 22).

157. Concern was also expressed that in revising the draft articles the Commission should not throw out the achievements of the past. The rules set out in articles 20 and 21 created a mechanism enabling judges to determine whether there had been a breach of a primary rule or obligation. In view of the need for a comprehensive and better structured framework for international law relating to breaches of international obligations, there were grounds for retaining the existing concepts, albeit in a simplified form.

(ii) Legal precision of the distinction

158. As to the question of the degree of precision inherent in the distinction, it was noted that there was no clear dividing line between the two types of obligations as they sometimes overlapped. An abstract categorization did not allow for the fact that the moment at which a breach occurred might differ, depending whether the rule was one in the field of human rights, for example, or in another domain. For example, in an Advisory Opinion of the Inter-American Court of Human Rights, [183] the Court stated that in the case of self-executing legislation incompatible with a human right, the violation of human rights, whether individual or collective, occurred by its adoption alone.

159. The international community attaches such value to certain rights like the rights to life, to physical and moral integrity, to non-discrimination and

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[183] International responsibility for the promulgation and enforcement of laws in violation of the Convention (American Convention on Human Rights articles 1 and 2), Advisory Opinion OC-14/94 of 9 December 1994, Inter-Am. Ct. H. R. (Ser. A) No. 14 (1994).

to recognition as a person before the law that the mere enactment of legislation contrary to those rights entailed international responsibility. The findings of the International Criminal Tribunal for the Former Yugoslavia concerning torture 184/ bore out that point. It was even possible to determine whether draft legislation was compatible with the provisions of human rights treaties. 185/

160. While it had been contended that general international law entitled States to choose the means whereby they would fulfil their international obligations at the domestic level, it was noted on the contrary, that the growing tendency to incorporate human rights into domestic legislation, the need for international regulation of certain offences in the field of human rights (for example, forced or involuntary disappearances), the globalization of certain democratic values and the joint efforts to promote the rule of law had greatly restricted the sphere in which States were free to choose the means of fulfilling their international obligations. The Iran-United States Claims Tribunal was one of the few to have referred extensively to the distinction between obligations of conduct and obligations of result and it had acknowledged that the freedom of States to choose such means was not absolute. 186/

161. Others observed that obligations of both conduct and result were indeed closely connected to the temporal dimensions of responsibility. The breach was constituted at the moment it occurred and continued during the time required by the obligations of conduct and obligations of result. In this regard articles 20 and 21, as adopted on first reading, served a purpose, in that they enabled an obligation to be posited as a primary rule, prescribing

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184/ International Tribunal for the Former Yugoslavia (Judges Mumba, Cassese, May), Prosecutor v. Anto Furundzija, judgement of 10 December 1998, para. 150.

185/ That had been made clear by the Inter-American Court of Human Rights in its Advisory Opinion on Restrictions to the Death Penalty (arts. 4(2) and 4(4) of the American Convention on Human Rights), Advisory Opinion OC-3/83 of 8 September 1983, Inter-Am. Ct. H. R. (Ser. A) No. 3 (1983).

186/ Islamic Republic of Iran v. United States of America, Cases Nos. A15(IV) and A24, Award No. 590-A15(IV)/A24-FT, 28 December 1998, at para. 95.

certain conduct even if the outcome remained uncertain. Furthermore, the distinction might still be useful in determining when a breach took place, which could have a bearing on reparation.

162. In response, the Special Rapporteur agreed that a case could be made out in favour of retaining the distinction because it helped to clarify the time aspect. But while the occurrence of the final result often corresponded to the moment of occurrence of the breach of an international obligation, that was not always true. The "special duty" referred to in paragraph 2 of article 22 of the Vienna Convention on Diplomatic Relations provided an important example. A State which failed to take all appropriate steps to protect the premises of a diplomatic mission against any intrusion or damage might be in breach of its obligation to do so even if, in the event, the threat was never realized. In other words, the obligation was triggered at an earlier stage. In other situations, the point at which the obligation came into effect was less clear; in that connection, he again referred to the Case concerning the Gabcikovo-Nagymaros Project, 187/ where the moment of occurrence of the Hungarian breach had not been in doubt, but the moment of the subsequent breach by Slovakia had had to be established by analysing the particular circumstances of the case.

(iii) Consistency with the distinction between primary and secondary rules

163. The view was expressed that the distinction clearly related to primary rules, and that its retention might to some extent lessen the separation between primary and secondary rules. In this regard, it was felt that if the Commission intended to be consistent with its own decision to focus only on secondary rules, it had to delete articles 20 and 21 as adopted on first reading. Indeed, the categorization of obligations did not fall neatly into the domain of State responsibility, which was essentially the domain of consequences, effects and results; retaining the articles would be tantamount to over-codification.

(iv) Alternative formulations

164. While strong support was expressed for not retaining articles 20, 21 and 23, as adopted on first reading, some members expressed a preference for having the material in the articles placed in the commentary. It was also

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187/ I.C.J. Reports 1997, p. 7.

suggested that the article could be submitted to the Sixth Committee in square brackets, but this was opposed in the Commission as unnecessarily complicating the Committee's work. Interest was also expressed in an intermediate solution of including a general reference to the distinction in article 16, or of resorting to the new article 20, as proposed by the Special Rapporteur, or a simplified version thereof as a middle course.

165. Of those members who preferred the deletion of the distinction from the draft articles, most favoured having it reflected in the commentary or even in a note to the commentary. In this regard, it was observed that the commentaries were informed by a wealth of doctrine, of which only a small portion was actually on display in the text. Article 20, if read in isolation from the commentary, simply stated something that anyone with common sense could deduce: that an international obligation requiring a certain course of conduct was breached in the event of a departure from that conduct. But in reality, there was no way to express the point in a less abstract manner, short of bringing in the full array of doctrine. Such point would be better made in the commentary, where it could be illustrated with concrete examples.

166. However, it was also cautioned that the articles under discussion had been with the Commission for more than 20 years. Over that period, many scholars had quoted them as elements of State responsibility and they had been referred to in certain judicial decisions. The Commission therefore had to explain why they were being deleted. Hence, in the present case some succinct explanatory note to justify the deletion of the articles would have to be included in the commentary to Chapter III.

167. As to the question of the relationship between the distinction and article 16, the comment was made that it was necessary to determine in specific cases whether the articles in question added anything to the general provision contained in article 16. It was felt that they sometimes seemed to repeat the same idea, i.e. that the violation of an obligation entailed responsibility. Hence the view was expressed that it could be helpful to link the three draft articles under discussion to article 16 and to include in article 16 a reference to the type as well as to the origin of the obligation. In response, the comment was made that if the solution were found in a broad rule set out in article 16, all the categories entailing a particular course

of action, a particular result or even the prevention of a specific event would have to be covered by the rule, so as to forestall the need for a separate classification.

168. While the Special Rapporteur agreed that the link with article 16 could be explored by the Drafting Committee, he did not feel that the Commission would be obliged, if it adopted the suggested approach, to spell out all the consequences, and certainly not in the text. Key elements of the commentary could, however, be retained.

169. In commenting on the new article 20, proposed by the Special Rapporteur, the view was expressed that while his reformulation was clearer than the existing draft articles, it still seemed to purport to make a normative distinction of general validity concerning a process which was often not applicable or the application of which would risk nothing but confusion.

170. Others maintained that while the main features of the draft were emerging, it was still impossible to foresee with certainty the impact on the rest of the draft of the removal of such an important stone from Ago's edifice. Under the circumstances, the solution proposed by the Special Rapporteur, namely, to simplify articles 20, 21 and 23 in the form of the new article 20 placed in square brackets, appeared to be the best one.

171. With regard to paragraph 1 of new article 20, it was doubted whether the proposal was an improvement on the existing language, which had the advantage of following the model of article 16 by beginning with the same words. Such uniformity was deemed desirable in a normative text when linking two closely related provisions.

172. In terms of a further view, obligations of conduct and of result, which were by their very nature different concepts, should not be combined in one article. Even though their amalgamation into one article streamlined the text, as a matter of legal technique, having two separate articles dealing with breaches of obligations of conduct and breaches of obligations of result was deemed preferable.

(b) Extended obligations of result

173. General support was expressed for the proposed deletion of the notion of extended obligations of result, contained in paragraph 2 of article 21. Nonetheless, it was noted that the underlying idea might be of some value and could therefore be mentioned in the commentary.

174. In terms of another view, it was not absolutely clear that the paragraph should be deleted and the point made only in the commentary. Paragraph 2 did contain something quite different, i.e. the question of the equivalence of results or the recourse by a State having an international obligation to a means other than the one assigned to it by the obligation.

175. In response, the Special Rapporteur remarked that the problem with paragraph 2 was that it equivocated between two positions, one unacceptable and one unexceptionable. It was unacceptable that there could be a breach which somehow later ceased to be a breach when something else was done, for example when compensation was paid for a violation of a human right. Such a violation was a violation, and payment of compensation did not change its status, which was what the commentary, unacceptably, said it did. The text could be accepted if it meant merely that there was no breach in the case of an obligation of result where the time for the State to take action had not yet come and the State meanwhile corrected the breach - but there was no need for an article to say so.

176. While it was agreed that the inference to be drawn from the commentary to article 21, paragraph 2 - that torture or arbitrary detention became permissible if compensation was subsequently paid - was entirely unacceptable, the remark was made that this did not mean that a concept which had stood the test of time should be jettisoned, merely because it was not all-encompassing or examples of oversimplification or over-refinement could be found. Indeed, article 21, paragraph 2, could be applied in other circumstances. For example, a State that had concluded an agreement to guarantee another State a certain quantity of water drawn from an international river might reduce that quantity but subsequently provide an equivalent supply from a different international river. No international responsibility would then arise. In such cases, article 21, paragraph 2, might be of some value, although the same point could be made in the commentary.

(c) Obligations of prevention

177. Different views were expressed in response to the proposed amalgamation of the notion of an obligation of prevention, as contained in article 23, in paragraph 2 of new article 20. On the one hand, support was expressed for its

deletion from the draft articles. Since the conduct prescribed was the material factor, obligations of prevention could be subsumed under the rubric of obligations of conduct.

178. Others, while not rejecting the proposed amalgamation, commented on the differences between the original version and that proposed by the Special Rapporteur. Hence, it was pointed out that, while the text adopted on first reading contained a specific reference to "conduct", no such reference was to be found in the text of the new article 20, paragraph 2. It was also remarked that the new article 20, paragraph 2, treated obligations of prevention in the same way as obligations of result. Yet, as had been pointed out in the debate, obligations of prevention were more often obligations of conduct. Indeed, obligations of prevention were often due diligence obligations, not obligations of result, particularly in treaties on the environment.

179. In this regard, it was observed that the obligation of prevention was also being addressed under the topic of international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), albeit from a different standpoint. 188/ Hence, it was suggested that the most prudent course would be simplification, so as not to assign the obligation of prevention to one category, thereby excluding another approach. By making no specific or implicit reference to the obligation of prevention in the draft articles, it could continue to be considered as a sub-category of either the obligation of conduct or of the obligation of result.

180. In response, the Special Rapporteur reiterated that in the original French understanding of the phrase, an obligation of prevention was an obligation of conduct - a general obligation to prevent something. Under the system set up by the draft articles, however, it was an obligation of result. Confusion resulted from the fact that most international lawyers used the phrase in the sense embodied in the French meaning, while the draft articles used it in the opposite sense. Which of the two possible distinctions between

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188/ See, the First report of the Special Rapporteur on prevention of transboundary damage from hazardous activities, A/CN.4/487, at para. 18.

obligations was to be made in the draft articles had to be very clearly spelled out; otherwise, the case for simplifying the draft articles by removing the distinction became overwhelming.

11. Concluding remarks of the Special Rapporteur on the debate on article 20

181. In summing up the discussion, the Special Rapporteur noted that the best case for the deletion of draft articles 20, 21 and 23 had been made, not by anglophones from the realm of the common law, but by the French Government, which considered that those articles related to the classification of primary rules and had no place in the text under consideration. Following the debate, he was more and more inclined to agree and thus his preference was for deleting the articles in question, which had never been cited in case law, even if the distinction itself was often mentioned. Nevertheless, he was attentive to the concerns about deleting the distinction, as expressed by a significant minority of members of the Commission.

182. The Special Rapporteur stated that, by and large, the Commission had agreed that article 21 (2), dealing with extended obligations of result, was an instance of over-codification. The provision confused a situation that was quite common, when the State had a choice between various modes of compliance (for example, in the case of the aut dedere aut judicare principle), with a situation when a prima facie breach was cured by subsequent conduct. The second situation was extremely rare, especially if, as was to be hoped, the Commission decided that exhaustion of local remedies did not fall into that category. To deal with it in the draft articles would only create confusion.

183. With regard to prevention of transboundary damage, he accepted that, in the light of the work it had done on the topic of transboundary damage, the Commission could not adopt a position that would make obligations of prevention into obligations of result. He remarked, however, that the general view was that, whereas most, but not all, obligations of prevention were obligations of means in the original sense of the distinction between the two types of obligations, to try to force them into a single matrix was to transgress the distinction between primary and secondary rules of responsibility on which the text as a whole was founded. By contrast, in dealing with transboundary damage, the Commission was concerned with the primary rules.

184. On the question of the utility of the distinction, he conceded that it was more than occasionally useful for the classification of obligations and might be helpful for determining when there had been a breach. He noted that there was a group of members of the Commission who thought that the distinction should be mentioned in the draft, not necessarily in separate draft articles, not necessarily in the new article 20, but possibly in article 16. However, he felt that this approach was problematic because when the distinction was actually used, it was used in the original sense, according to which obligations of means or of result did not necessarily correspond to obligations that were determinate or indeterminate. Although the tendency perhaps existed for obligations of means to be more determinate, the distinction was not one based on that criterion. The fact that the Commission had taken one conception of the distinction and turned it into another conception had given rise to enormous confusion.

185. In the Special Rapporteur's view, the idea of merely taking note of the distinction, without defining it in the draft articles, was not necessarily a way of evading that problem. He suggested that the Drafting Committee should therefore consider the possibility of articulating the distinction in a satisfactory way in the original French terms, in which most obligations of prevention were to be understood as obligations of means. If it could not, it should then try the "minimalist" solution of mentioning the distinction, possibly in the framework of article 16.

186. If neither of those solutions worked, then draft articles 20, 21 and 23 as adopted on first reading would simply have to be deleted. He was convinced that they were a case of unnecessary over-codification which explained why they were so often criticized, both within the Commission and outside it, and why even the courts that used the distinction between obligations of means and obligations of result did not refer to those articles. The majority of the members of the Commission shared that view.

12. Introduction by the Special Rapporteur of articles 24 and 25 (Completed and continuing wrongful acts) 189/

187. The Special Rapporteur proposed to consider article 18, paragraphs 3 to 5, and articles 24 to 26, together because they all dealt with the issues of the moment and duration of the breach of an international obligation.

189/ The text of article 24 proposed by the Special Rapporteur reads as follows:

"Completed and continuing wrongful acts

1. The breach of an international obligation by an act of the State not having a continuing character occurs when that act is performed, even if its effects continue subsequently.

2. Subject to article 18, the breach of an international obligation by an act of the State having a continuing character extends from the time the act is first accomplished and continues over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and its continuance remains not in conformity with the international obligation."

The text of article 25 proposed by the Special Rapporteur reads as follows:

"Breaches involving composite acts of a State

1. The breach of an international obligation by a composite act of the State (that is to say, a series of actions or omissions specified collectively as wrongful in the obligation concerned) occurs when that action or omission of the series occurs which taken with its predecessors, is sufficient to constitute the composite act.

2. Subject to article 18, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act and for so long as such actions or omissions are repeated and remain not in conformity with the international obligation."

See, doc. A/CN.4/498. For an analysis of the article by the Special Rapporteur see, ibid., paras. 93-135.

(a) Terminology

188. The Special Rapporteur noted, with regard to the question of the moment of time at which a breach occurred, that most breaches of international law were bound to be of some duration. The use of the word "moment" was therefore unnecessary.

189. He also observed that a problem arose in the case of situations where it was clear that an obligation was going to be breached but the actual moment of breach had not yet occurred. That situation, described as "anticipatory breach" in United Kingdom law and treated as a "positive breach" in German law, was subsumed under the notion of repudiation, or refusal to perform a treaty in article 60 of the Vienna Convention on the Law of Treaties. Although an equivalent definition could be included in the draft articles, he did not think that such a definition was strictly necessary. Use of the word "occurs", without going into further detail, would be sufficient.

(b) Distinction between "composite" and "complex" acts

190. Article 25, on acts extending in time, differentiated between "composite" and "complex" acts. A composite act consisted of a series of actions relating to what article 25 called "separate cases" which, taken together, constituted a breach, regardless of whether each action individually constituted a breach, for example, the adoption of the policy of apartheid by means of a complex of laws and administrative acts. Complex acts were different from composite acts in that they occurred in relation to the same case, for example, a series of acts against an individual which, taken together, amounted to discrimination.

191. The Special Rapporteur was not convinced that the distinction was helpful in the present context. The question to be answered was whether or not a breach had occurred. Reference was made to the Case concerning the Gabcikovo/Nagymaros Project 190/ as an example of a situation where the fine distinction between the two, as drawn in paragraphs 2 and 3 of article 25, would not seem to be relevant.

190/ I.C.J. Reports 1997, p. 7.

192. In his view, the distinction between a completed act and a continuing one was far more relevant and should be retained, although, once again, its precise application would depend on the nature of the primary obligation involved and on the circumstances of the case.

(c) Treatment of composite acts

193. The Special Rapporteur pointed to the case when the primary obligation focused on an act that could only be defined as composite, for example, genocide as distinct from a simple act of murder. But the draft articles as they stood were not limited to obligations characterizing conduct as wrongful by reason of its composite or collective nature. The notion of a composite act in the draft could apply to any obligation breached by a series of actions relating to different cases. The obligations in international law which prohibited conduct by reference to its aggravated nature and to its effects on a human group, such as genocide, were extremely serious and the problem of treating them as a collective act raised important questions. On the other hand, it was not at all clear that there was a need to treat in that way composite acts which were composite only accidentally but related, for instance, to a rule prohibiting conduct causing serious harm by air pollution. Such conduct might well constitute a composite act, but there was no reason why that should make any particular difference. From that standpoint, there was no reason to treat composite acts any differently from other kinds of act.

194. In his view, it was thus useful to retain the notion of a composite wrongful act, but to confine it to cases where the obligations arise under primary rules defining the wrongful conduct in composite or systematic terms. A different analysis was needed in the case of obligations which singled out conduct as unlawful by reason of its composite character, and special issues of the time factor could arise.

(d) Complex acts

195. Similarly, the notion of a complex act did not refer to an act defined as complex in a rule but rather to an act that happened to be complex. Again, there seemed to be compelling reasons to treat this case. As to wrongs which were defined as complex acts, there were far fewer of these and they had no special significance. By contrast, composite acts were defined as wrongs in

very important norms, in the Genocide Convention for example. It was on such grounds that complex acts had been incisively criticized in the literature. 191/

196. It was noted that the previous Special Rapporteur, Ago, had needed the notion of a complex act in order to fit it in with his construction of the exhaustion of local remedies rule, contained in article 22. Where that rule applied, the failure of local remedies was the last step in the complex act constituting the wrong. That was known as the substantialist theory of the exhaustion of local remedies. The orthodox view of exhaustion of local remedies was the procedural view, namely, that the wrong might have occurred but no international action could be taken by way of a diplomatic claim or human rights complaint prior to the exhaustion of local remedies. Under article 22, as adopted on first reading, by implication the Phosphates in Morocco 192/ case had been wrongly decided. The only event after the critical date in that case had been the failure to exhaust the local remedies.

197. The problem was that, according to the normal understanding, where an obligation was breached and the exhaustion rule applied, the applicable international law was the law applicable at the time the harm was done and not at the time the local remedies were exhausted; indeed it was difficult to specify that time because of the different ways in which local remedies could be exhausted. Having treated complex acts as occurring only at the time of the last act in the series, the draft could achieve that result only by backdating the complex act to the first act in the series. Article 18, paragraph 5, thus meant that the act occurred only at the end, but that the applicable law was the law in force at the beginning of the complex act. This was indeed a "complex" construction. It was, in his view, wholly unnecessary since the Phosphates in Morocco case was rightly decided on the interpretation of the applicable instruments of that case.

198. The Special Rapporteur therefore recommended the deletion of the notion of complex acts entirely. Problems of breach could be resolved without it, and the extraordinarily convoluted structure of the intertemporal law as

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191/ See, e.g., J. Salmon, "Le Fait étatique complexe: une notion contestable", AFDI, vol. XXVIII, 1982, pp. 709-738.

192/ Phosphates in Morocco Case (Preliminary Objections), P.C.I.J. Series A/B, No. 74 (1938).

applied to such acts could also be done away with. It followed that article 22 had to be examined on its merits in terms of the exhaustion of local remedies rule.

(e) Question of the applicable intertemporal law

199. The Special Rapporteur indicated that the Commission still had to solve the problem of the intertemporal law as it applied to completed and continuing acts and composite acts. In his view, the solutions adopted in the draft articles (art. 18, paras. 3 and 4) for the application of the intertemporal law to continuing and composite acts were essentially right. Furthermore, he agreed with the proposal of the French Government that the applicable intertemporal principles be tied in with the draft articles.

(f) Obligations of prevention

200. As to obligations of prevention and the duration of a breach thereof, the Special Rapporteur pointed out that article 26 incorrectly treated breaches of such obligations as necessarily being continuing wrongful acts. Some breaches of obligations of prevention might be continuing acts but others not, depending on the context. For example, if there was an obligation to prevent the disclosure of a piece of information, the disclosure of the information marked the end of the matter. There was no reason for treating anything occurring subsequently as a wrongful act. In other cases, such as those involving an obligation to prevent intrusions into diplomatic premises, the breach would obviously be a continuing one.

(g) Articles 24 and 25 as proposed by the Special Rapporteur

201. For the reasons explained above, the Special Rapporteur proposed that the new article 24 draw a distinction between completed and continuing wrongful acts. Paragraph 1, dealing with completed acts, would incorporate what had previously been in article 24. Paragraph 1 had to be contrasted with continuing wrongful acts, which remained breaches for as long as the international obligation remained in force.

202. The proviso "Subject to article 18" was included in paragraph 2 to cover the situation in which a continuing wrongful act had begun prior to the entry into force of the substantive obligation and had continued thereafter. The act became wrongful only when the obligation came into force. Paragraph 2

incorporated the substance of existing article 25 and article 18, paragraph 3. Paragraph 3, dealt with the question of continuing breaches of obligations of prevention, and would also have to be subject to article 18.

203. It was explained that the new article 25 dealt with the notion of composite acts albeit more narrowly defined, adopting the solution to the intertemporal problem set out in paragraph 2, and again subject to article 18.

13. Summary of the debate on articles 24 and 25

204. While the Special Rapporteur's views and suggestions on articles 18 (3 to 5), 24 and 26 were generally supported in the Commission, the view was also expressed that all reference to the question of when a wrongful act began and whether and for how long it continued could be deleted, on the grounds that it was a matter for interpretation of the primary rules and the application of logic and common sense.

(a) Completed and continuing wrongful acts

205. In regard to article 24 proposed by the Special Rapporteur, it was noted that the object of the exercise was not to define, on the one hand, a wrongful act not extending in time and, on the other, a continuing wrongful act, but to determine where a wrongful act had been committed, when the breach had occurred and how long it had continued.

206. The view was expressed that article 24, paragraph 3, was subordinate to the provision in article 20, paragraph 2, concerning the obligation to prevent a particular event. The two clauses should therefore be handled in the same way, and that meant placing paragraph 3 between square brackets for the time being.

207. In response, the Special Rapporteur pointed out that an obligation of prevention might quite conceivably be breached by a single act of a State which was not itself of a continuing nature. The breach could, nevertheless, consist in the continuation of the result and not in the continuation of the act by the State that had produced the result. That was why the article occupied a separate place in Chapter III.

208. It was observed in the Commission that, as regards continuing acts, European practice provided sufficient proof of how difficult it was to establish them clearly. In particular, it was difficult to distinguish clearly between such acts and instantaneous acts with a lasting effect, as borne out by the reasoning of the European Court of Human Rights in the

Papamichalopoulos and others v. Greece case. 193/ Contrary to the traditional view that deprivations were instantaneous acts, the Court ruled that a continuing breach had occurred because it was impossible to identify precisely the act that had led to the deprivation.

209. Recent European history had turned the issue into a highly political one, the question having arisen whether certain acts committed by different States after the Second World War and resulting in the deprivation of property were contrary to the European Convention on Human Rights by which those States were now bound. It could be argued that the absence of compensation for the deprivations, which had not been contrary to international law at the time they had occurred, would amount to a wrongful act today.

210. It was further noted that the Special Rapporteur had justified the distinction between continuing and completed acts by reference to article 41 of the draft articles, which dealt with the cessation of wrongful conduct. But that article was somewhat peculiar because it stated that the consequence of an internationally wrongful act was the obligation to comply with international law. The obligation to comply with international law did not, however, depend on the commission of an internationally wrongful act. Hence, the article was not really necessary in the context, and if it were deleted, then the distinction between continuing and instantaneous acts could also be deleted, subject to it not entailing any other legal consequences.

(b) Complex acts

211. The Special Rapporteur's proposal that the concept of "complex acts" be deleted was generally supported in the Commission. Reference was made to the difficulty of deriving the distinction between composite and complex acts by reference to the primary rule. The example of genocide given by the Special Rapporteur showed that the primary rule was not very helpful in that regard.

(c) Composite acts

212. The view was expressed that the application or non-application of the rule of the exhaustion of local remedies depended on the issue of composite acts. If the primary injured subject changed from, e.g., the individual to a State of which he is a national, this would affect the application of the rule

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193/ 24 June 1993, ECHR, Series A, No. 260-B, para. 40.

of the exhaustion of local remedies insofar as it did not apply in the case of a composite wrongful act. The question, however, still remained as to whether the wrongful act would amount to a composite act.

213. As to paragraph 1 of article 25, it was further queried why the moment when a given action or omission occurred was established by reference to preceding actions or omissions. Instead, the approach could be reversed so as to refer to the moment when the first action or omission constituting the composite act occurred and then refer to the actions and omissions which occurred subsequently.

214. In response, the Special Rapporteur observed that it would take some time for the act to occur since it was composed, by definition, of a series of actions or omissions which occurred over time and were defined collectively as wrongful. Genocide was one example of a composite act. The first murder of a person belonging to a given race was not necessarily sufficient to establish that genocide had been committed, but, if it was followed by other similar murders and those murders were systematic, the genocide constituted by that series of murders would be deemed to have begun at the moment of the first murder. Indeed, the idea of taking into account the first actions or omissions whose whole series constituted the composite act was not a new one, as it had already existed in article 25, as adopted on first reading.

14. Concluding remarks of the Special Rapporteur on the debate on articles 24 and 25

215. The Special Rapporteur observed that the Commission clearly favoured simplifying the provisions in question, even if there were differences of opinion as to the extent of that simplification. The main issue of principle was whether the notion of a continuing wrongful act should be retained. In his view, at the very least, the Commission should leave new article 24 in square brackets pending consideration of article 41, which it had not yet decided to delete.

216. As to whether continuing wrongful acts could have other consequences within the framework of responsibility, he noted that it was not impossible that the question of extinctive prescription might be affected by whether a wrongful act was or was not continuing. He thought that an article dealing with loss of the right to invoke responsibility should be included in Part Three, by analogy with article 45 of the Vienna Convention on the Law of Treaties. His own view was however that, although its incidence could be

affected by whether the wrongful act was continuing or not, the principle of extinctive prescription remained the same, whether in respect of a continuing wrongful act or other acts.

217. He accepted that the obligation of cessation in article 41 was not a separate secondary obligation existing by reason of the primary obligation. But the idea of cessation was implicated in Part II in the sense that it was deeply concerned with the choice between restitution and compensation, a choice that the injured State would normally make. It was true that there was a presumption in favour of restitution and, in some cases, especially those involving peremptory norms, restitution might be the only possibility. But in many situations there was a de facto choice and the question of the identification of the injured State arose in that context. It might be that the injured State could call on the wrongdoing State for cessation of the wrongful act, but others could not. It might also be the case that there were more non-injured States with an interest in the cessation of the wrongful act than States actually injured by the breach. These possibilities still needed to be examined, and his own view was that in some form the notion of cessation of wrongful conduct should be retained in Part Two.

218. Hence, article 40 might need to draw a distinction between cessation, on the one hand, and compensation, on the other, with consequences for the rest of the draft articles.

219. For these and other reasons, the Special Rapporteur felt that a distinction must be drawn between completed and continuing wrongful acts. There was a difference between the effects of a completed internationally wrongful act and the continuation of the wrongful act. While the Commission could not express an opinion, for example, on whether expropriation was a continuing or a completed wrongful act, it could emphasize the primacy of article 18, so that acts that had been complete at a time when they had been lawful did not subsequently become the subject of contention because the law had changed. He supported the idea that all possible permutations must be considered within article 18; and proposed that the Commission retain the concept of a continuing wrongful act in Chapter III. It could return to the issue once it had a clearer view of the overall scheme of the draft articles.

15. Introduction by the Special Rapporteur of article 26 bis (Exhaustion of local remedies rule) 194/

220. The Special Rapporteur explained that in its original conception, the exhaustion of local remedies was the last step of the complex act constituting the breach, and the breach therefore occurred only at the time of exhaustion. But the failure of local remedies might not be an independent breach of international law at all. The national court denying a remedy might be acting fully in accordance with domestic law, and that law itself might not be contrary to international law. However, that was not always the case, and he would therefore be reluctant to treat the article 22 debate as involving an outright choice between the proceduralist and the substantialist understandings.

221. In some cases the failure of local remedies was itself part of the breach, for example if it constituted a further or culminating instance of discrimination; in other cases it was not. The normal understanding was that the exhaustion of local remedies was a prerequisite to an international claim in certain cases, but the Commission was not required to define those cases in detail in the draft articles on State responsibility, especially since it would be called to do so in its work on Diplomatic Protection.

222. On the basis of the proceduralist understanding it might be argued that the rule had no place in the present draft articles, but to drop it entirely could be regarded as provocative. He thus proposed that it be kept, albeit in the form of a savings clause. No one had proposed that it should be deleted, but several Governments had argued strongly against the way in which it was

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194/ The text of article 26 bis proposed by the Special Rapporteur reads as follows:

> "Exhaustion of Local Remedies
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> These articles are without prejudice to the requirement that, in the case of an international obligation concerning the treatment to be accorded by a State to foreign nationals or corporations, those nationals or corporations should have exhausted any effective local remedies available to them in that State."

See, doc. A/CN.4/498. For an analysis of the article by the Special Rapporteur see, ibid., paras. 136-148.

presented in the original Chapter III. He had therefore retained article 22 as a "without prejudice" clause, placed at the end of Chapter III as article 26 bis, but it might eventually be placed elsewhere.

16. Summary of the debate on article 26 bis

223. The observation was made that the rule of the exhaustion of local remedies, which was well established not only in treaty law, but also in customary law, was a means of ensuring recognition of and respect for internal legislation and national systems.

224. Differing views were expressed regarding the retention of the rule in the draft articles, with some expressing a preference for its deletion, while others strongly advocated its retention as an essential component of the law of international responsibility, or at least as an element to be reflected in the form of a "without prejudice" clause.

(a) Procedure versus substance

225. It was noted that, as adopted on first reading, article 22 represented an attempt to combine two approaches. According to the first approach, the use of local remedies provided the wrongdoing State with the opportunity to remedy what appeared to be a breach of an international obligation. According to the second, exhaustion of local remedies was required in all cases and was a burden imposed on the private party before a claim could be preferred on its behalf.

226. Support was expressed for the Special Rapporteur's view that, in most cases, the treatment itself constituted the breach and the exhaustion of local remedies was a standard procedural condition for establishing the admissibility of a claim and that, where the failure to provide an adequate local remedy might itself be a wrongful act in some cases, this reflected a primary rule or obligation, and was not the basis of the rule of the exhaustion of local remedies.

227. In terms of a further view, it was observed that if the exhaustion of local remedies was viewed as affecting the admissibility of a claim, the requirement would naturally be viewed as procedural. However, once remedies were exhausted, the kind of legal consequences that attached to wrongful acts might not necessarily ensue. A State might use its good offices with a view to ensuring that a natural or legal person enjoyed certain treatment even before remedies were exhausted.

228. In the case of a claim arising from the breach of an obligation, however, the exhaustion requirement would have to be complied with. Moreover, a waiver of the rule was not necessarily decisive. It might follow from an agreement between the States concerned or constitute a unilateral act, altering the circumstances of a case but leaving general international law unaffected.

229. While sympathy was expressed for the view that exhaustion of local remedies affected the admissibility of a claim, it was noted that further thought should be given to the issue of whether admissibility of claims had a place in Part One, or whether the article could be located in Part Two or Three.

230. It was observed that the current Special Rapporteur's proposal would lead to a drastic change by adopting the procedural concept, so as to maintain, in line with the Phosphates in Morocco case, 195/ that responsibility was triggered at the time of the breach and not at the time when local remedies were exhausted. It was felt that this was not easy to reconcile with the idea that the rule of the exhaustion of local remedies should give the State the opportunity of remedying its wrongful act.

231. Furthermore, if the Commission accepted that new concept, it should not lose sight of other problems which it entailed. If an individual harmed by a wrongful act decided not to resort to local remedies, would the State of which he was a national nonetheless be entitled to take measures within the framework of the law of State responsibility, regardless of the fact that the State at fault offered the possibility of obtaining reparation? The Commission would have to regard the exhaustion of local remedies rule as an obstacle not only to the exercise of jurisdiction, but also to the adoption of other measures under the law of State responsibility or, in other words, to the implementation of State responsibility.

232. The Special Rapporteur noted, in response, that when the breach of an international obligation harmed only one person and if that person deliberately decided not to take any action, even if the State concerned might have an interest in protesting against the treatment of its national, it did indeed seem that the more specific elements associated with Part Two of the

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195/ Phosphates in Morocco Case (Preliminary Objections), P.C.I.J. Series A/B, No. 74 (1938).

draft articles could not be applied (including countermeasures). At issue was the whole question of preclusion and not a simple procedural rule in the narrow meaning of the term.

233. In the Special Rapporteur's view, rather than having to choose between two irreconcilable views, the Commission should indicate clearly that, in some situations, responsibility could not be implemented before the exhaustion of local remedies.

(b) Article 26 bis

(i) General observations

234. The view was expressed that neither article 26 bis proposed by the Special Rapporteur nor the Commission's discussion had really done justice to the matter. The commentary to the corresponding article 22 adopted on first reading ran to some 20 pages and dealt with the legal principles underlying the rule, State practice, judicial decisions and the writings of jurists. However, by limiting his comments the Special Rapporteur seemed to assign a minor role to the rule of the exhaustion of local remedies and had even cast doubts on its inclusion, or at least its location, in the draft articles.

235. In response, the Special Rapporteur sought to dispel any misunderstanding. He viewed the rule of the exhaustion of local remedies as an established rule of general international law. However, it had to be recognized that, contrary to the provision of the former article 22, an international obligation might be breached even in cases where the individuals concerned had not exhausted local remedies.

(ii) Scope of the rule

236. While the Special Rapporteur's approach in article 26 bis enjoyed support, it was observed that the issue of the application of the rule of the exhaustion of local remedies was dealt with only from the standpoint of diplomatic protection, and that it should also be considered in the context of human rights, since many human rights instruments referred to it.

237. In response, the Special Rapporteur admitted that he had not dealt in any detail with the scope of the exhaustion of local remedies rule because this would be a major part of the work on diplomatic protection. He had simply followed the original text. As had been noted, human rights instruments explicitly stipulated that the rule was applicable to complaints by individuals of a violation of human rights, and it would also apply to

violations under customary international law. Nevertheless, the rule was not always applicable, for example, in the case of wholesale violations.

238. He stressed that it was not the purpose of article 26 bis to specify when the rule was applicable or when local remedies were exhausted. There were two reasons for that. First, the issue would be addressed in connection with the subject of diplomatic protection. Secondly, in the event of a breach of a treaty obligation, there was no need to go beyond what the treaty in question stipulated in respect of the exhaustion of local remedies.

239. In terms of another view, the wording of article 26 bis was not sufficient, since it did not state either the origin of the requirement of exhaustion or the effect of that requirement. While the need to meet the requirement depended on the particular character of the infringed primary rule, primary rules could not in fact go very far. These conditions would therefore have to be spelt out in the draft articles.

240. It was proposed that the Commission revert to the formulation of the rule adopted by the Conference for the Codification of International Law, held at The Hague in 1930. 196/ In support of that proposal, it was observed that that language was clear and simple and left open the question of the concept underlying the provision. A further suggestion was made in the Commission to reformulate the provision as follows: "These articles are without prejudice to any question relating to the exhaustion of local remedies where such a condition is imposed by international law". It was argued that this formulation would cover diplomatic protection, breaches of human rights or even a bilateral agreement that explicitly provided for the exhaustion of local remedies as a prerequisite for any international petition.

(iii) Location of the rule

241. The view was expressed that the question of the legal basis of the rule and of its effects could easily be resolved in article 26 bis or in Part Two. This solution would have the advantage of accounting for the possibility of excluding the application of that condition by treaty, as provided for in the

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196/ The formulation read as follows:

> "The State's international responsibility may not be invoked as regards reparation for damage sustained by a foreigner until after exhaustion of the remedies available to the injured person under the municipal law of the State."

Convention on the settlement of investment disputes between States and nationals of other States. A further possibility raised was the insertion of the rule in chapter V of Part One, dealing with circumstances precluding wrongfulness.

242. The Special Rapporteur agreed that the problem could be solved in the framework of Part Two or Part Three, and expressed support for moving article 26 bis in order to solve some of these problems. While this idea enjoyed support in the Commission, it was noted that the location of the article dealing with the rule could be discussed once the overall structure of Parts Two and Three are clearer.

17. Concluding remarks of the Special Rapporteur on the debate on article 26 bis

243. The Special Rapporteur remarked that it had been generally agreed that an article on the exhaustion of local remedies should be retained in the draft articles, and that the article could be reformulated in broader terms. It had also been generally agreed that the article should not prejudge the nature of the obligation of the exhaustion of local remedies, which could vary from one situation to another; and that the Commission should be careful not to bypass the obligation of the exhaustion of local remedies, for example, having regard to the question of countermeasures and, to that end, should specify the consequences of the obligation, in particular the time when the rule applied in the case of an individual breach.

18. Chapter IV (Implication of a State in the internationally wrongful act of another State)

(a) Approach to Chapter IV by the Special Rapporteur

244. The Special Rapporteur explained that Chapter IV of the draft articles, entitled "Implication of a State in the internationally wrongful act of another State", dealt essentially with the question whether a State that had induced or assisted another State to commit an internationally wrongful act was itself also responsible for the commission of a wrongful act. Document A/CN.4/498/Add.1 contained an introduction on the scope of Chapter IV and an analysis of articles 27 and 28 and document A/CN.4/498/Add.3 presented a brief comparative analysis of the practice of certain national legal systems with regard to interference with contractual rights, in other words, the

question whether inducing others to breach their contractual obligations constituted a wrongful act. The comparative analysis showed that legal practice in that field was very diverse, but also that Chapter IV seemed to have been strongly influenced by the principle of liability applicable to interference with contractual rights under French law. According to that principle, anyone who knowingly assisted another in committing an act that was wrongful for that other was also responsible. In practice, however, that principle was often nuanced. German law adopted a restrictive position on that question, whereas English law adopted an intermediate position, whereby anyone who knowingly induced another person to breach a contractual obligation could be held liable for a wrongful act, but there might be grounds justifying his conduct. The analogies had their limitations, but it had been interesting to note that Chapter IV transposed a general assumption of responsibility from a national legal system and that had proved a source of difficulties.

245. Some of the provisions of articles 27 and 28 dealt with primary rules of substantive law. By reconceptualizing Chapter IV slightly, it was possible to bring it into the framework of secondary rules. Having regard to the explanation and examples given in the commentary, Chapter IV should be seen as essentially concerned with situations in which a State induced another State to breach a rule of international law by which the inducing State was itself bound. A State could not escape responsibility for committing, through another State, an act for which it would be held responsible if it had itself committed that act. Some legal systems might resolve that problem by applying doctrines of agency. But that approach was not reflected exactly in Chapter II. In any event, it seemed appropriate, in the context of Chapter IV, to stress the condition that, in order for the responsibility of a State to arise, that State must itself be bound by the relevant obligation. It was that idea, and the desire not to trespass into the field of primary rules, that had inspired the revised text of article 27. It was also significant that no Government had argued for the complete deletion of Chapter IV. The task now was to make Chapter IV coherent with the framework of the text.

246. The draft articles were based on the proposition that each State was responsible for its own wrongful conduct, in other words, for conduct attributable to it under the articles of Chapter II or for conduct in which it was implicated under the articles of Chapter IV. In his view, there was no need to go beyond that proposition. That approach might be spelt out more explicitly in the commentary, in the introduction to Chapter IV or even in the introduction to Chapter II.

247. He proposed replacing the current title of Chapter IV, "Implication of a State in the internationally wrongful act of another State" by the title "Responsibility of a State for the acts of another State" because he did not think it possible to assume that the act committed by the other State would be internationally wrongful, as the act might be held not to be wrongful under the provisions of Chapter V, especially article 31.

248. Article 28, paragraph 3, was a "without prejudice" clause that must be applied to the whole of Chapter IV and he proposed to be drafted as a separate article 28 _bis_.

(b) Summary of the debate on the approach to Chapter IV

249. There was a general view, albeit not unanimous, that Chapter IV as drafted on first reading was problematic and should be reconsidered. It was noted that Chapter IV, adopted on first reading, did not take account of possibilities other than the criminal law or public law approach. Consequently other norms such as _jus cogens_ and _erga omnes_ obligations had to be taken into account in the new formulation. Support was expressed for the Special Rapporteur's approach, which did this, albeit indirectly. However, it was noted that the proposed texts by the Special Rapporteur also contained a number of problems. It was important, it was noted, to review the Commission's theoretical premises and the positioning of the various articles of the draft, which was based on a new, more "objective", paradigm in which the commission of a wrongful act entailed responsibility even when there was no damage.

250. Some members were of the view that even though the Special Rapporteur's redraft of the articles of Chapter IV was a vast improvement on the text adopted on first reading, the articles of this Chapter would rarely be applied in practice and that the matters dealt with the articles of that Chapter should be left to primary rules and the rules on attribution. Also in taking

on coercion, the Commission was entering difficult terrains of defining coercion. The deletion of the Chapter would allow the "purity" of the draft articles as an exercise in secondary rules to be retained.

251. It was also said that the original articles 27 and 28 were much influenced by the concept of crime dealt with in article 19. The Special Rapporteur was right to raise the question whether there should be a general rule applicable equally to bilateral treaties and peremptory norms.

(c) Concluding remarks of the Special Rapporteur on the approach to Chapter IV

252. The Special Rapporteur said that in his view the Commission must remain faithful to the fundamental principles of the draft articles, while being conscious that in some situations the draft articles unavoidably touched on the area of primary rules. He agreed that some elements of the text in Chapter IV must be appreciated having regard to the economy of the draft articles and to the legal tradition. What must certainly be excluded was the adoption of secondary rules which depended for their content on a judgement as to the content of particular primary rules. He pointed out that by definition, the rules in the draft articles were of a general character applicable to all primary rules or at least to certain general categories of primary rules. He agreed that Chapter IV did not contain only secondary rules in the strict sense of the term. However, in his view, articles 27 and 28 had a place in the draft articles, firstly because they dealt with questions analogous to problems of attribution, and secondly, at least in respect to coercion, because of the relationship with the excuse provided for in article 31. So, in his view, it was important, as a matter of principle, not to adopt too rigid a position and not to push the analysis of the scope of Chapter IV too far.

(d) Introduction by the Special Rapporteur of article 27 (Assistance or direction to another State to commit an internationally wrongful act) 197/

253. The Special Rapporteur stated that international law based itself on the general rule that a treaty created neither obligations nor rights for a third State without its consent (art. 34 of the 1969 Vienna Convention on the Law of Treaties), a principle also expressed in the Latin maxim pacta tertiis nec nocent nec prosunt. Yet, in its original form, article 27, drafted on first reading, seemed to violate that principle, for it raised the problem of the responsibility of a third State not bound by the obligation in question if it had deliberately caused a breach of that obligation. That provision seemed, first, to be a substantive rule and not a secondary rule; and secondly, to be unjustified. Its scope was much too broad, for, while there might well be situations in which a State that induced another State to breach a bilateral treaty ought to be considered as having committed a wrongful act, such cases were rare.

254. There was an extremely wide range of situations in which States acted in some sense jointly in producing an internationally wrongful act. It had been pointed out that article 27 did not address all those cases, particularly the situation in which States acted collectively through an international organization, where the conduct producing the internationally wrongful act was that of the organs of the organization and was not as such attributable to the States. The question was to what extent the States which, collectively, procured or tolerated the conduct in question could be held responsible for

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197/ Text of article 27 proposed by the Special Rapporteur reads:

Assistance or direction to another State to commit an internationally wrongful act

"A State which aids or assists, or directs and controls, another State in the commission of an internationally wrongful act is internationally responsible for doing so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State."

See A/CN.4/498/Add.1, p. 21.

doing so. It had been decided at the preceding session that that question raised the issue of the responsibility of international organizations and should not be dealt with in the framework of the draft articles, as it went beyond the realm of the responsibility of States. However, there were other situations in which States acted collectively without acting through separate legal persons and the Commission would have to return to that question in the context of Part Two, when dealing with restitution and compensation.

255. Moreover, because, as he had explained, he did not think that, in the framework of secondary rules, at least in the context of article 27, it should be considered that States incurred responsibility in case of breaches of obligations other than those by which they were themselves bound, he proposed that the initial version of article 27 should be amended to establish that State responsibility arose on two conditions: first, that the implicated State had acted with knowledge of the circumstances of the internationally wrongful act and, secondly, that the act in question would be internationally wrongful if it had been committed by that State. The original wording of article 27 was too vague. Furthermore, the words "rendered for the commission of an internationally wrongful act" were ambiguous and unclear, particularly if account was taken of aid programmes, for it might be that the aid provided was used for the commission of an internationally wrongful act. In order to respect the pacta tertiis nec nocent nec prosunt principle, it was important to make it clear that a State that had assisted another State incurred responsibility only if the act performed would have been wrongful if it had committed it itself. Thus, the new text considerably limited the scope of article 27 and set forth what could properly be regarded as a secondary principle of responsibility.

(e) Summary of the debate on article 27

256. Support was expressed for the general purpose of article 27. However, views differed as to the utility of the retention of the article as well as some of the concepts used in the text.

257. Those members who had preferred the deletion of Chapter IV as a whole, also had difficulties with article 27. It was pointed out that article 27 presupposed the existence of a general rule of international law that prohibited the rendering of aid or assistance in the commission of an internationally wrongful act. It was doubtful that any such rule existed, at

least in customary international law. Even if such a rule existed, it belonged in the realm of primary rules, which did not fall within the Commission's remit.

258. Questions were also raised with respect to the meaning of the phrase "with knowledge of the circumstances of the internationally wrongful act". Did it mean that the assisting State must have the intention of facilitating the commission of the internationally wrongful act, or was it sufficient that it had knowledge of the fact that the assisted State would use the aid or assistance to commit an internationally wrongful act? What should be done about cases of uncertainty, e.g., where there was a risk that the assisted State would so act, but it was not certain?

259. The view was also expressed that by addressing in his proposed new article 27 two distinct cases, covered by article 27 and article 28, paragraph 1, the Special Rapporteur had complicated rather than simplified things. The two cases were very different. The existing article 27 dealt with two separate internationally wrongful acts: the act of a State which by aid or assistance facilitated the commission of an internationally wrongful act by another State, and the unlawful act of that other State, which constituted the principal breach. In contrast, article 28, paragraph 1, dealt with a single internationally wrongful act which was attributable to a State exercising the power of direction or control of another State. The raison d'être of responsibility differed in the two cases. In the first case (art. 27) it was intentional participation in the commission of a wrongful act, i.e. complicity; in the second case (art. 28, para. 1) it was the incapacity of the subordinate State to act freely at the international level. The criterion was therefore absolute: a State exercising direction or control was automatically responsible even if it was unaware of the commission of the wrongful act by the subordinate State. Thus, the Special Rapporteur's first condition (proposed art. 27 (a)) was fine for article 27 adopted on first reading but not for article 28, paragraph 1.

260. The comment was made that article 27 dealt with assistance by one State to another, but experience showed that States often committed a wrongful act jointly, with each bearing equal responsibility. In such cases the requirements of article 27 on awareness were irrelevant. Joint conduct of States carried out within the framework of an international organization

should be addressed in the articles on the responsibility of such organizations. However, the draft articles should address as a separate issue the responsibility of States for the joint commission of wrongful acts. It was not of particular significance to the Commission whether such acts were committed under the auspices of an organization. The situation was such a topical one that the Commission could not defer a decision until it had dealt with the articles on the responsibility of international organizations.

261. It was suggested that article 27 was torn between the traditional bilateralist position and new considerations of community interest and public order. On the other hand article 27 was a case of progressive development of international law, but the provision manifested a certain hesitation about going too far. Thus, complicity was taken into account, but not incitement, although the latter weighed heavier in criminal law. Article 27 should include a reference to "material" or "essential" aid or assistance, which was important enough to appear in the text of the article itself. Furthermore, when addressing the question of "crimes", the Commission should consider whether the extent of a third State's implication in the case of a "crime" could be greater than in the case of a "delict".

262. It was pointed out that the wording proposed by the Special Rapporteur rightly assumed that the aiding or assisting State should also be under an obligation not to commit the internationally wrongful act. In the case of a human rights treaty, however, all States parties were under an obligation to prevent a violation of human rights in any specific circumstances covered by the treaty. That was an erga omnes obligation. Aiding or assisting would thus be relevant to such cases. Article 27, subparagraph (b) appeared to have excluded from its scope strictly bilateral treaty obligations in which State C was not bound by any rule contained in a treaty concluded between States A and B. On the other hand, as it currently stood, article 27 covered not only the case of obligations erga omnes but also of obligations under other rules to which both States were subject.

263. It was also stated that subparagraph (a) was pleonastic, as the elements of knowledge were already built into the conditions of aiding, assisting, directing and controlling. It was also likely to cause misunderstanding, as

it might actually set conditions of responsibility, and set them at rather a high level. The article would be much improved by deleting subparagraph (a), with subparagraph (b) retained as the sole condition.

264. A preference was also expressed for the text of article 27 adopted on first reading. That text according to this view suggested that aid or assistance was wrongful even if, taken alone, it would not constitute the breach of an international obligation. That very useful clarification did not appear in the proposed article 27.

(f) Concluding remarks of the Special Rapporteur on the debate on article 27

265. The Special Rapporteur said that he had joined the notion of aid or assistance to that of direction and control not because he thought they were similar but on the grounds that they were subject to the same regime. He agreed that there were three situations under Chapter IV: aid and assistance, direction and control, and coercion, and that the conditions for each needed to be considered separately. He also agreed with the view that the level at which one set aid and assistance depended on whether article 27, subparagraph (a) was retained. If subparagraph (a) was deleted, aid and assistance would have to be further particularized. The reason why he had proposed that the wording should merely be "aids or assists" was that the requirements contained in subparagraph (a) alleviated any difficulties regarding the threshold.

266. He further agreed that there might be a need for an article making it clear in Chapter II that where more than one State engaged in the conduct, it was attributable to each of them. Chapter IV was not concerned with joint conduct in the proper sense of the word - which would include a situation in which two States acted through a joint organ (other than an international organization). Where a joint organ acted on behalf of several States - for example, in launching a satellite - that constituted conduct of each of those States, attributable to them under Chapter II. Chapter IV was concerned with a different situation in which a State did not itself carry out the conduct but assisted, directed or coerced conduct, which nevertheless remained the conduct of another State. There was absolutely no intention to exclude the case of joint action. The fact that any joint action might in some sense be coordinated by an international organization did not mean that the States concerned were not themselves carrying out the conduct. If it was the State's

agent that engaged in the act, the State was responsible for the acts of its agent or organ, even though there was some umbrella coordinating role of an international organization. That situation was not excluded by the proposed subparagraph (a). The problems of joint conduct should thus be seen within the framework of Chapter II. The Drafting Committee should consider whether some clarification of that point was required in Chapter II itself, or whether it could be adequately dealt with in a commentary forming part of the chapeau to Chapter II.

267. The Special Rapporteur also agreed with the proposal that articles 27 and 28 should include a greater element of materiality, preferably in the commentary but possibly also in the articles themselves, without going too far in elaborating general rules. With regard to terminology, he noted that the definition of a "material" breach given in the Vienna Convention on the Law of Treaties was more reminiscent of a fundamental or repudiatory breach striking at the core of the obligation that had been breached, and thus differed from the criterion of materiality applicable in article 27. But the term would have different meanings in different contexts; some clarification was necessary, though without incorporating whole segments of criminal law in the articles.

(g) Introduction by the Special Rapporteur of article 28 (Responsibility of a State for coercion of another State) 198/

268. The Special Rapporteur stated that he had proposed a new article 28 because the initial wording had raised a number of problems. To begin with, as several Governments had pointed out, the term "coercion" as used in paragraph 2 was imprecise. He took the term in the strong sense, as something more than persuasion, encouragement or inducement, but as not necessarily limited to unlawful use of force in violation of Article 2, paragraph 4, of the Charter of the United Nations. It could be argued that the same approach

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198/ Text of article 28 proposed by the Special Rapporteur reads:

Responsibility of a State for coercion of another State

> "A State which, with knowledge of the circumstances, coerces another State to commit an act which, but for the coercion, would be an internationally wrongful act of the latter State is internationally responsible for the act."

See, ibid, p. 22.

should be adopted to article 28 as was now adopted in the case of article 27, namely, that the coercing State should be regarded as responsible only for an act which would have been internationally wrongful if it had committed it itself. But, that would lead to difficulties for, in certain circumstances provided for in Chapter V, the acting State could be excused from responsibility by reason of force majeure. One could acknowledge that coercion itself was not unlawful, but that it was unlawful for a State to coerce another State to commit an unlawful act. The coercing State must of course have acted with knowledge of the circumstances. He thus proposed that article 28, paragraph 2, should be amended to make it clearer and also that it should be the subject of a separate article.

269. As paragraph 1 of article 28 was too broad in scope, but had points in common with article 27, it would be deleted and some of its components taken up in the new version of article 27 or in a separate article. The mere fact that a State could have prevented another State from committing an internationally wrongful act by reason of some abstract power of direction or control did not seem to be a sufficient basis for saying that the passive State was internationally responsible. Of course, matters were quite different when a primary obligation imposed on a State, as it did in the case of humanitarian law, a positive obligation of prevention of breaches by others.

(h) Summary of the debate on article 28

270. While expressing difficulties with the text of article 28 adopted on first reading, many members raised a number of questions about the new formulation and expressed concerns about how the notion of coercion should be addressed in article 28.

271. General support was expressed for the Special Rapporteur's view that article 28 was concerned with actual direction and control and not merely power to exercise direction or control, possibly by virtue of a treaty, and that coercion must attain a certain threshold. However, coercion could be introduced as a form of implication of a third State without entering into a discussion on when coercion became illegal. In that connection the title of the article was not consistent with its content.

272. The observation was made that the exact meaning of "coercion" in the context of article 28 was unclear. It was also unclear whether all reprisals

and countermeasures could be included in the meaning of that term. According to the commentary to article 28 adopted on first reading, coercion is not necessarily limited to the threat of or use of armed force, and should cover any action seriously limiting the freedom of decision of the State which suffers it - any measures making it extremely difficult for that State to act differently from what is required by the coercing State. In the Special Rapporteur's view, coercion for this purpose is nothing less than conduct which forces the will of the coerced State, giving it no effective choice but to comply with the wishes of the coercing State. Thus it is not enough that compliance with the obligation is made more difficult or onerous; the coercing State must coerce the very act which is internationally wrongful. As those criteria were essential for determining the grounds for coercion and its consequences, it would be desirable to include in the draft articles a definition of the terms used, duly defining the nature and scope of coercion and making it clear that the term was not confined to the use of armed force, but could also include economic pressure of a severe kind.

273. It was also stated that if article 28 were to include only unlawful coercion, the third State would risk not being compensated if coercion was lawful and the coerced State could claim force majeure to escape responsibility. The third State would have to pay a price, in the interest, perhaps, of international law. Thus if the condition contained in article 27 (b), that "the act would be internationally wrongful if committed by that State", is also added to article 28 as an alternative condition to that of unlawful use of force, the coercing State should assume responsibility towards the third State because it would be aware of the possibility of a breach occurring.

274. The Special Rapporteur's view that there was no reason why article 28 (2) should be limited to breaches of obligations by which the coercing State was bound was found unconvincing. In any event, the question was not whether a certain type of coercion was lawful or unlawful, but whether, if the coercing State was not under an obligation into which the coerced State had entered with other States, it should be held responsible for the breach of the obligation. The problem was raised in the new version of article 28 more acutely. In this context a question was also raised about the meaning of the phrase when a State "with knowledge of the circumstances",

coerced another State to commit a wrongful act. An example was given: State A became a party to a treaty binding several States not to sell a primary commodity below a certain fixed price. State B coerced State A into selling the product at a price below the floor set in the agreement, not through force, but through economic pressure. Such coercion was not unlawful under international law. There were serious doubts as to whether State B could be held responsible for the breach.

275. The comment was made that the terms "direction and control" were more closely related to "coercion". One possible approach would be to draft three separate articles, the first dealing with aid and assistance, the second with direction and control, and the third with coercion. An alternative approach would be to revert to the version adopted on first reading: aid and assistance would be covered by article 27, with the addition of the two provisos, direction and control by article 28, paragraph 1, with clarifications in the commentary, and coercion by article 28, paragraph 2.

276. On the other hand, a view was also expressed that article 28, adopted on first reading did not give rise to any particular problems. The revised text was also found acceptable, except for the phrase "but for the coercion", which, according to this view, was superfluous.

(i) Introduction by the Special Rapporteur of article 28 bis (Effect of this chapter) [199]

277. The Special Rapporteur said that paragraph 3 of article 28 preserves the responsibility of the State which has committed the internationally wrongful act, albeit under the direction or control or subject to the coercion of another State. The same saving clause would be appropriate for article 27.

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[199] Text of article 28 *bis* proposed by the Special Rapporteur reads:

Effect of this chapter

"This chapter is without prejudice to:

(a) The international responsibility, under the other provisions of the present articles, of the State which committed the act in question;

(b) Any other ground for establishing the responsibility of any State which is implicated in that act."

See ibid., p. 23

In addition, it should be made clear that the provisions of Part IV are without prejudice to any other basis for establishing the responsibility of the assisting, directing or coercing State.

(j) Summary of the debate on article 28 bis

278. Support was expressed for the Special Rapporteur's proposal for article 28 *bis* dealing with the effects of Chapter IV as a whole. It was suggested, however, that the text of the article should be made clearer.

19. Approach to Chapter V by the Special Rapporteur

279. In introducing his report on Part One, Chapter V, entitled "Circumstances precluding wrongfulness" (A/CN.4/498/Add.2), the Special Rapporteur explained that at issue were general "excuses" which were available to States in respect of conduct which would otherwise constitute a breach of an international obligation. Chapter V must therefore be seen in relation to Chapter III.

280. In commenting on Chapter V, no Government doubted the need for it. One government proposed lumping all of Chapter V into a single article, but there were important distinctions between different conditions which would be obscured by so doing. The chapter had been very extensively referred to in the literature and in judicial decisions and heavily relied on, for example in the *Rainbow Warrior* [200] arbitration and the *Gabcíkovo-Nagymaros Project* [201] case.

281. As to the concept of circumstances precluding wrongfulness, the Special Rapporteur observed that the initial proposition was that the draft articles were not concerned with formulating the content of primary rules, but with the framework of secondary rules of responsibility, yet it was the primary rules which determined what was wrongful. Hence, a difficulty could arise in distinguishing between the proper content of the primary rules and the notion of circumstances precluding wrongfulness.

282. The commentary on the first reading text on that point went so far as to say that the circumstances precluding wrongfulness actually brought about the temporary or even definitive setting aside of the obligation. That notion was

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[200] United Nations, *Reports of International Arbitral Awards* vol. 20 (1990), p. 217, at pp. 251-252.

[201] I.C.J. Reports 1997, p. 7, at p. 63, see also p. 38.

difficult to square with the idea of secondary rules, or the distinction between an excuse in respect of the performance of an obligation and the continued existence of the obligation. In that regard, the International Court of Justice had been very clear in the Gabcíkovo-Nagymaros Project case, where it stated that although Hungary might be entitled to rely on necessity as a ground for excusing its non-performance of the treaty, the treaty nonetheless continued to exist. The plea of necessity, even if justified, had not terminated the treaty. As soon as the state of necessity ceased, the duty to comply with the treaty revived.

283. Consequently, in considering, for example, whether the excuse of necessity, force majeure should apply, it was important to have regard to the obligation itself. If the obligation was set aside, it might well be that the circumstances in question were conditions of the primary obligation and not circumstances precluding wrongfulness as envisaged in Chapter V. There was clearly a difference between an excuse for non-performance of an obligation and a ground for its termination in the future.

284. Another important difference between the question of the continued validity of an obligation and the question of the excuse for non-performance, was that, generally speaking, the former required action by one of the parties to put an end to the obligation. In other words, the State concerned must elect to take action.

285. A third difference between circumstances precluding wrongfulness and the termination of obligations was that the circumstances precluding wrongfulness applied with regard to non-treaty obligations as well as treaty obligations, and it was very difficult for one State to terminate a non-treaty obligation, for example an obligation under customary international law. There might be circumstances in which they could be suspended, although there was very little State practice even in that regard.

286. The Special Rapporteur observed that one Government in its comments had said that there seemed to be a difference among the circumstances precluding wrongfulness. Some appeared to make the conduct lawful, as it were, but it was not certain that others did. For example, an action taken in a state of distress or necessity might be excused, but in relation to necessity, in particular, the action was obviously being taken faute de mieux, the situation was undesirable and it ought to be terminated as soon as possible.

This was a different situation from that in cases of consent or self-defence. The distinction seemed to be that between a justification and an excuse. The Commission need not, perhaps, go so far as to make that distinction in Chapter V itself, although the matter should be discussed in the commentary.

287. In his report, the Special Rapporteur proposed a slight change in the order in which the circumstances precluding wrongfulness were presented in Chapter V. Because of its importance, the chapter began with article 29 bis, dealing with jus cogens - the deletion of article 29 having been proposed by the Special Rapporteur. Article 29 ter on self-defence, which might be said to be cognate with jus cogens, followed. Thereafter came article 30 on countermeasures, and article 30 bis, dealing with non-compliance caused by prior non-compliance, which was analogous to countermeasures. Lastly came the three special cases of force majeure, distress and state of necessity and the two procedural provisions.

288. The Special Rapporteur explained that he had tried to resolve some particular problems and to reorganize the chapter so as to make its underlying conceptual structure clearer.

20. Introduction by the Special Rapporteur of article 29 (Consent) 202/

289. The Special Rapporteur stated that it was evident from the commentary to article 29 that the article related exclusively to consent given in advance of the act. Consent given after the event to conduct which was unlawful but might have been lawful if the consent had been given beforehand was clearly an example of waiver, which was not a matter for Part One.

290. A number of States had raised difficulties with the formulation of article 29, including the notion of consent validly given, because it implied a whole body of rules about when the consent was given, by whom, in relation to what, and so on.

291. A more fundamental problem was whether consent constituted a circumstance precluding wrongfulness at all. A serious question arose as

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202/ For the text of draft article 29 as adopted on first reading see Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), p. 135. For the analysis of this article by the Special Rapporteur, see A/CN.4/498/Add.2, paras. 230-241.

to whether there was any room for consent as a circumstance precluding wrongfulness. He conceded that some obligations could not be dispensed with and they applied irrespective of consent, and certainly of the consent of other States. For example, one State could not dispense another State from complying with human rights obligations. The same applied to norms of *jus cogens*, although consent could sometimes be relevant in the application of such norms; for instance, consent to the use of armed force on the territory of the consenting State would normally be effective, even though the underlying norm of *jus cogens* continued to exist.

292. For the reasons explained in his report, [203] he believed that there were problems with the formulation of article 29. In his view, it seemed better to conceptualize consent given in advance as something which the primary rule permitted. On this view, article 29 could be deleted.

21. Summary of the debate on article 29

293. Differing views were expressed regarding the proposed deletion of consent as a circumstance precluding wrongfulness. While support was expressed for this proposal, a majority of members favoured its retention and supported the referral of article 29, as adopted on first reading, to the Drafting Committee.

294. For those members who supported the deletion, consent given in advance could be seen as a manifestation of the primary rule, while consent given after the event involved waiver. It was recognized that in doing so the Commission was taking a broad view of primary rules - an approach deemed useful.

295. It was also noted, by way of supporting the proposed deletion, that too many abuses had been committed in the name of prior consent validly given. Furthermore, whether or not consent had been freely given in advance was a crucial question of fact that was fraught with difficulties, for it had often been invoked by States to attempt to justify what were blatant acts of intervention.

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[203] A/CN.4/498/Add.2, at paras. 230-241.

296. Support was also expressed for the view that consent rendered an obligation non-existent and therefore the consent was not a circumstance precluding wrongfulness since the conduct in question had been legal at the time of its occurrence.

297. In favour of the retention of the article, it was said that there could be situations in which consent had retroactive effect. The Special Rapporteur agreed that cases of valid retrospective consent which did not merely constitute a waiver could indeed arise. In his view, however, such cases should properly be dealt with in Part Three of the draft articles.

298. It was further noted that deleting consent from the list of circumstances precluding wrongfulness could be interpreted as the abrogation of an important principle. In this regard, it was pointed out that no State had objected to the principle embodied in article 29.

299. The Special Rapporteur's argument that all primary rules provided for the possibility of valid consent to an act not in conformity with an obligation, was unconvincing. From the point of view of the victim, it may be that no wrongful act could occur where valid consent had been given; but from the point of view of third States, the act could still be wrongful unless it was established that their consent had also been given.

300. The view was expressed that the fact that there had been consent did not mean that the rule from which the obligation derived ceased to exist or even that it had been suspended. It was essential to distinguish clearly between the case in which consent given in a particular situation precluded wrongfulness and cases of the suspension of a treaty under articles 57 and 65 of the Vienna Convention or derogation from a rule of general international law (customary law) by agreement.

301. It was argued that just as article 62 of the Vienna Convention on the Law of Treaties elaborated on the rebus sic stantibus principle, so the draft articles on State responsibility should elaborate on the principle of consent as a circumstance precluding wrongfulness.

302. As to the concern that the provision leaves some scope for abuse it was doubted that its deletion would provide States, and in particular smaller and weaker ones, with better protection. Deleting it would simply shift the

problem by requiring States to consider whether consent was implied and to undertake a process of interpretation for want of clearly stated limits. It was preferable that article 29 be drafted so as to guard against possible abuse.

22. Concluding remarks of the Special Rapporteur on article 29

303. The Special Rapporteur stated that his concern had been to situate the idea of consent within the framework of the distinction between primary and secondary rules, which had been made in Chapter V. He noted that some members did not consider article 29 as relating to the issue of consent given in advance in a treaty, which they saw not as a circumstance precluding wrongfulness within the meaning of Chapter V, but as part of lex specialis. On the other hand, there could be cases where consent was given at the relevant time, without it being specifically envisaged by the primary rule. The maxim volenti non fit injuria was widely accepted and, according to this view, should be reflected in Chapter V of Part One.

304. There could, he agreed, be some situations in which the only excuse or justification for a conduct was consent that had remained in force at the time of the act. That was especially true in the case of the use of force. If a State consented in advance to the use of force in its territory and then withdrew its consent, recourse to force became wrongful, even if the State had withdrawn its consent ill-advisedly. It was doubtful whether a State could waive its right to withdraw its consent to the use of force in its territory by another State.

305. It was true that Governments had not criticized the inclusion of article 29 as such, but they had expressed concerns about its wording, concerns which went beyond what some of the comments suggested. On balance, he was receptive to the argument that deletion of the article could give a false impression. The question was where exactly the boundary between primary rules and secondary rules lay, and the Commission could adjust that boundary to take account of the general principle of consent.

23. Introduction by the Special Rapporteur of article 29 bis (Compliance with a peremptory norm) 204/

306. The Special Rapporteur observed that a circumstance that had not been covered by the draft articles was that of performance in conflict with a peremptory norm. It had been expressly proposed by Fitzmaurice, as Special Rapporteur for the Law of Treaties, in his fourth report 205/ and was referred to in the literature. The problem stemmed partly from the way in which the system established by the Vienna Convention on the Law of Treaties operated in cases of *jus cogens*. The invocation of *jus cogens* invalidated the treaty as a whole. Such cases were very rare. Usually, breaches of *jus cogens* occurred through the continued performance of a perfectly normal treaty in the event of, for example, a proposed planned aggression or the supply of aid to a regime that became genocidal. Such breaches were thus to be considered as "occasional" or "incidental": they did not arise from the terms of the treaty as such but from the circumstances which had arisen.

307. Under the Vienna Convention only parties to a treaty are entitled to invoke inconsistency of the treaty with *jus cogens*, the implication apparently being that the parties might have the choice of electing in favour of the treaty and against the norm. The problem of inconsistency could also arise in connection with other obligations under general international law. For example, the obligation to allow transit passage through a strait might in certain circumstances be incompatible with a norm of *jus cogens*. Unless such cases of occasional inconsistency were recognized, the potential invalidating effects of *jus cogens* on the underlying obligation seemed excessive. He thus proposed a provision to that effect.

204/ The text of article 29 *bis* proposed by the Special Rapporteur reads as follows:

> Compliance with a peremptory norm (*jus cogens*)
>
> The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is required in the circumstances by a peremptory norm of general international law.

See A/CN.4/498/Add.2. For the analysis of this article by the Special Rapporteur, see ibid., paras. 306-313.

205/ *Yearbook ... 1959*, vol. II, p. 46.

308. The Special Rapporteur noted that the Commission had agreed, when addressing the issue in the context of article 18, paragraph 2, in Chapter III, that it would be necessary to revert to the question of the supervening norm of jus cogens if it was not satisfactorily resolved in Chapter V. Nevertheless, article 18, paragraph 2, was concerned only with the unusual case of a new norm of jus cogens. Hence Chapter V was the natural place for the article and had the additional advantage of resolving the problem raised in article 18, paragraph 2.

24. Summary of the debate on article 29 bis

309. Differing views were expressed regarding the necessity of including proposed article 29 bis. In the view of some, the provision was absolutely essential because Chapter V would be incomplete without it. The need to establish a circumstance precluding wrongfulness in order to exonerate States which lived up to their obligations arising from jus cogens was undeniable. Others indicated that, while article 29 bis was perhaps not absolutely necessary, its inclusion could do no harm.

310. A further view was expressed that it was difficult to imagine a situation in which the rule provided for in article 29 bis would be applicable, since the peremptory norm would always determine the content of the obligation.

311. Reference was further made to the strong doubts about jus cogens expressed by a number of Governments, which could not be overlooked. It was noted in this regard that the doubts related not so much to the substantive values embodied in jus cogens norms, such as those prohibiting genocide, slavery, war crimes, crimes against humanity and others, but rather to the uncertainty surrounding peremptory norms and to the risk of destabilizing treaty relations. It was observed that the International Court of Justice had up to now not used the term jus cogens in any judgment or advisory opinion, while endorsing the concept of "intransgressible rules" in its Advisory Opinion on the Threat or Use of Nuclear Weapons. Hence caution was advised in deciding whether compliance with peremptory norms should be included in Chapter V.

312. There was a further difficulty with article 29 bis in that it did not make clear who was to implement the peremptory norm. The provision could be read as implying that any State could, with very serious consequences,

arrogate to itself the right to act as an international policeman by invoking, for example, human rights. This view was disputed by others, however, and the example was given of a State which in selling arms to another State discovered that the purchasing State intended to use those arms to commit genocide. In that scenario, the danger to the international order resided in the potential genocide rather than in the seller's decision to refuse to proceed with the sale for the time being.

313. It was also suggested that a reference to obligations under Article 103 of the Charter could be included in the proposed article 29 bis.

314. As to the necessity of including a definition of a "peremptory norm", it was noted that while the Special Rapporteur had stated that it was not necessary to do so, that had already been done in article 29, paragraph 2, adopted on first reading. The view was expressed that the definition, which continued to be disputed, had to appear somewhere in the draft, but not necessarily in the place where it was located at present. The draft also did not necessarily have to reproduce the definition given in article 53 of the Vienna Convention, which had been drafted for the purposes of treaty law. Others said, however, that to involve the Commission in the task of elaborating a new definition of jus cogens would be unrealistic and inappropriate.

315. The suggestion was made in the Commission that a more general provision on the subject of jus cogens, which might or might not reproduce the definition contained in article 53 of the Vienna Convention, be included in Chapter I. Such a provision establishing a general link between the doctrine of jus cogens and the subject of State responsibility could obviate the need for article 29 bis and other provisions dealing with peremptory norms.

25. Concluding remarks of the Special Rapporteur on article 29 bis

316. The Special Rapporteur recalled that the debate on article 29 had not revealed any disagreement on the basic proposition that consent validly given could have the effect of precluding State responsibility. Rather, the point at issue had been whether that proposition should be dealt with in Chapter V. Except for the suggestion to formulate a general provision on peremptory norms to be included in Chapter I, no equivalent conceptual concern had been

expressed about the placing of article 29 bis. The doubts had been about the existence of any practical examples because, by reason of their operation, norms of jus cogens would eliminate the obligation itself rather than simply its consequences.

317. In fact the examples adduced had tended to relate to the use of force, which entailed the operation of Article 103 of the Charter, and this would be covered by article 39 of the draft on the assumption that that article would apply to the draft as a whole. Yet situations were more likely to arise in consequence of other criminal activities, such as genocide, which all States were required to prevent. He saw no reason why, in the case of genocide, the obligation of prevention did not have the same status as the obligation not to commit genocide.

318. The debate had also revealed a strongly-held conviction that the law of State responsibility was affected by the notion of obligation to the international community at large, even if some members of the Commission had more difficulty than others in identifying those effects.

26. Introduction by the Special Rapporteur of article 29 ter (Self-defence) [206]

319. The Special Rapporteur remarked that self-defence had never been omitted from any list of the circumstances precluding wrongfulness. The only minor argument against the article, so far as government comments were concerned, involved the exact formulation by reference to the principles of the Charter

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[206] The text of article 29 ter proposed by the Special Rapporteur reads as follows:

Self-defence

"1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

2. Paragraph 1 does not apply to international obligations which are expressed or intended to be obligations of total restraint even for States engaged in armed conflict or acting in self-defence, and in particular to obligations of a humanitarian character relating to the protection of the human person in time of armed conflict or national emergency."

See A/CN.4/498/Add.2. For the analysis of this article by the Special Rapporteur, see ibid., paras. 292-302.

of the United Nations. In his view, the notion of self-defence in international law was that which was referred to, but not comprehensively defined, in Article 51 of the Charter.

320. However, the provision, as adopted on first reading, failed to recall that certain obligations, such as international humanitarian law or non-derogable human rights, were unbreachable even in self-defence. That point should be made in an additional subparagraph. Fortunately, the International Court of Justice had dealt with the problem in the context of its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. 207/ It had been argued that nuclear weapons could not be used if their effect was to violate environmental obligations. The Court had drawn a distinction between general environmental obligations and environmental obligations specifically intended as a condition of total restraint in time of armed conflict. It was only in the latter case that self-defence could not be invoked as a justification. He had therefore proposed a paragraph 2 embodying that idea.

321. One question was whether the article should deal specifically with the problem of third States. The assumption underlying the article was that it was concerned with circumstances precluding wrongfulness as between States acting in self-defence and aggressor States. However, a State acting in self-defence might be entitled to take action against third States. However, there was no need to make an explicit reference to that circumstance, which was adequately covered by the relevant primary rules.

27. Summary of the debate on article 29 ter

322. The view was expressed that the article on self-defence should be confined to the provisions of the Charter of the United Nations. Any broader application would create more controversy on an already complex issue of international law. Hence, only the inherent right of individual or collective self-defence set out in Article 51 of the Charter should be envisaged. It was noted that the wording of paragraph 1, which was identical to that proposed in article 34 on first reading, did in fact refer the notion of self-defence to that in Article 51 of the Charter.

207/ I.C.J. Reports 1996, p. 226, at p. 242, para. 30.

323. The view was expressed that there was a right of self-defence that had the contours and limitations of the right recognized in Article 51 of the Charter and no other broader right. It was also noted that although the Charter might not actually confer a right of self-defence, it set forth regulations and limitations relating to the role of the Security Council and the circumstances necessitating armed action.

324. Doubts were expressed regarding the distinction the Special Rapporteur had introduced between the obligation of total restraint and one of lesser restraint.

325. It was also queried where the limit of the applicability of paragraph 2 should be drawn. The view was expressed that it would suffice to explain in the commentary that the word "lawful" in paragraph 1 was to be understood in a way so as to cover the substance of paragraph 2.

326. One possible reading was that paragraph 1 dealt with the issue of jus ad bellum. The right existed to use military force in self-defence, and from that point of view, the word "lawful" in the phrase "if the act constitutes a lawful measure of self-defence" would describe the circumstances - the preconditions - for acting in self-defence, in the event of an armed attack for example.

327. In terms of this approach, it was not obvious that the word "lawful" would cover all limitations applicable once a State acted in self-defence, limitations which, in doctrinal terms, were subsumed under the heading of jus in bello and should be spelled out. It was argued that these should be retained in paragraph 2 because paragraph 1 could convey the false impression that everything was permissible in self-defence.

328. In this regard, a further view was expressed that the term "lawful", in particular, if connected with the word "measures", was indeed a reference to jus in bello and deleting it would have no effect whatsoever on the statement regarding jus ad bellum. As such, it covered the subject matter of paragraph 2, and therefore it was preferable to leave the provision unchanged.

28. Concluding remarks of the Special Rapporteur on article 29 ter

329. The Special Rapporteur reiterated the fact that there had been a recent decision by the International Court of Justice expressly directed to the issue in the framework of environmental obligations, which was not humanitarian law, and the formulation of paragraph 2 reflected the language employed by the

Court, which had been asked to find that environmental obligations overrode self-defence. The Court had ruled that they did so only when they were expressed in such a way as to apply as obligations of total restraint in armed conflict. In his view, paragraph 2 was right; it was not a case of progressive development, but of current law, and the only question was how to enunciate it.

330. He observed that the commentary to article 34, adopted on first reading, had failed to interpret the word "lawful" in the sense that had emerged during the discussion, relating it exclusively to the requirements of proportionality, necessity and an armed attack.

331. Moreover, self-defence in the context of Chapter V was not taken as a circumstance precluding wrongfulness only in relation to the use of force. The position was that self-defence was a justification or an excuse, as the International Court of Justice had ruled in the Advisory Opinion on the Threat or Use of Nuclear Weapons, in relation to breaches of other obligations, e.g. the obligation not to cause substantial harm to the environment of a neighbouring State. In response to the argument that such obligations prevented the use of nuclear weapons, the Court had stated that, where a State was acting in self-defence, they did not. But there was another category of obligations that had to be complied with even in self-defence. If the Commission wished to take the position that the word "lawful" covered not only jus ad bellum but also jus in bello, and authorized him to produce a commentary to that effect, paragraph 2 might not be necessary.

29. Introduction by the Special Rapporteur of article 30 (Countermeasures) 208/

332. A preliminary debate on article 30 (Countermeasures) was held during the Commission's consideration of Chapter V, at which time the Special Rapporteur noted that the fate of the provision was linked to the outcome of the Commission's consideration of the regime of countermeasures in Chapter III of Part 2. While general agreement was expressed for including an article on countermeasures in Chapter V as a circumstance precluding wrongfulness, the Special Rapporteur proposed retaining the text of the provision, as adopted on first reading, in square brackets.

208/ For the analysis of this article by the Special Rapporteur see A/CN.4/498/Add.2, paras. 242-249.

333. Following the completion of its consideration of Chapter V, the Commission had the opportunity to consider the question of article 30 further on the basis of addendum 4 to the Special Rapporteur's second report (see below paras. 426-452).

30. Introduction by the Special Rapporteur of article 30 *bis* (Non-compliance caused by prior non-compliance by another State) 209/

334. The Special Rapporteur proposed a second new provision relating to the maxim *exceptio inadimpleti contractus*, which he referred to as "the *exceptio*". He observed that it was well established in the traditional sources of international law. The Permanent Court of International Justice had ruled in the *Case concerning the Factory at Chorzów (Jurisdiction)* 210/ that "one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question". That principle had been applied in a variety of contexts. The Court had avoided applying it in the *Diversion of Water from the Meuse* case, 211/ but its very avoidance had been a tribute to the principle involved. The International Court of Justice had applied it in the context of loss of the right to invoke a ground for terminating a treaty in the *Gabcíkovo-Nagymaros Project* case.

209/ The text of article 30 *bis* proposed by the Special Rapporteur reads as follows:

> "*Non-compliance caused by prior non-compliance by another State*
>
> The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the State has been prevented from acting in conformity with the obligation as a direct result of a prior breach of the same or a related international obligation by another State."

See A/CN.4/498/Add.2. For the analysis of this article by the Special Rapporteur, see ibid., paras. 314-329.

210/ P.C.I.J. Series A, No. 9 (1927), p. 31.

211/ P.C.I.J. Series A/B, No. 70 (1937).

335. The Special Rapporteur also referred to the Klöckner v. Cameroon case 212/ decided by the International Centre for Settlement of Investment Disputes (ICSID). An ICSID tribunal had applied the *exceptio* in favour of the respondent State. Citing the Diversion of Waters from the Meuse case, it had referred to the fact that the *exceptio* was recognized in international law, but had gone on to treat the *exceptio* as a ground for the termination of the obligation. The decision was subsequently annulled by a review body, which had indicated its understanding that the *exceptio* was a basis not for the termination, but for the suspension, of an obligation. The point on which the decision had been annulled had thus been that a circumstance precluding wrongfulness had been involved, not a ground for the termination of a contract. That decision had, however, involved the law of one State, and not, directly, international law.

336. The *exceptio* had substantial comparative law underpinnings and had been broadly accepted by Special Rapporteur Fitzmaurice as a ground for excusing non-performance of treaties. 213/ Special Rapporteur Riphagen had proposed to deal with it in the framework of what he called "reciprocal countermeasures". 214/

337. The Special Rapporteur maintained that a clear distinction needed to be drawn between the broad and narrow forms of the *exceptio*. Fitzmaurice had formulated it broadly in respect of any synallagmatic obligation. But the formulation in the Chorzów Factory case was narrower. Article 80 of the United Nations Commission on International Trade Law (UNCITRAL) Convention on Contracts for the International Sale of Goods was an example of the narrow approach.

338. For the reasons stated in his report (A/CN.4/498/Add.2), the Special Rapporteur proposed that the narrow version of the *exceptio* should be separately recognized. In his view, it was not enough to deal with it under the law relating to the suspension of treaties because that law required a material breach, which was narrowly defined.

212/ ICSID Reports, vol. 2, p. 4.

213/ *Yearbook ... 1959*, vol. II, pp. 45, 46.

214/ *Yearbook ... 1984*, vol. II, Part One, p. 3.

339. On the other hand, the broad or generic form of the exceptio had been sufficiently addressed by the law of suspension or termination of treaties in respect of treaty obligations and the law of countermeasures in respect of all obligations. It was thus sufficient to recognize the Chorzów Factory form of the inadimplenti doctrine as an automatic and temporary excuse for non-compliance with an obligation.

31. Summary of the debate on article 30 bis

340. Diverging views were expressed in regard to the inclusion of the exceptio in Chapter V. On the one hand, it was noted that it surfaced from time to time in legal textbooks and, in practice, and was cited by States more often than might be thought, in particular in the field of international economic law. Conversely, it was noted that it would be dangerous to codify such a rule since it would give States the opportunity not to perform a synallagmatic obligation without having to go through the carefully drafted limitations on countermeasures, by reacting "tit for tat" without any formalities.

341. Concern was also expressed that the proposed new provision brought together several concepts that were only partially interrelated. A view was expressed that the maxim "inadimplenti non est adimplendum" (not being required to respect an obligation if the other party to the contract did not respect its own) and the exceptio that derived from it were always related to contractual obligations, in other words, to treaty obligations in the context of international law. The principle was firmly entrenched in primary rules and had been codified as such in article 60 of the Vienna Convention on the Law of Treaties. It was not a principle that applied to international law in general and was not applicable in the context of customary law. This view that the exceptio related solely to contractual obligations was, however, contradicted by others.

342. It was suggested that the content of the provision was covered by the article on force majeure, and that it was possible, when reading article 30 bis in conjunction with article 31, to see in article 30 bis a special case of force majeure. However, it was pointed out that linking force majeure to the situation covered in article 30 bis seemed inappropriate. Furthermore, not all the conditions spelled out in article 31 were applicable to article 30 bis.

343. Support was expressed for the Special Rapporteur's view that draft article 30 bis was unrelated to article 60 of the Vienna Convention on the Law of Treaties. Moreover, the purpose of countermeasures, as expressed in article 47, was very different from the purpose of the proposed article embodying a narrow exceptio.

344. Others suggested that the matter depended on the scope of the eventual provision on countermeasures, and that it was difficult to refer article 30 bis to the Drafting Committee, thereby separating it from the study of countermeasures. It was thus proposed that article 30 bis be placed in square brackets, without approval or rejection, and that it should be determined during the consideration of countermeasures whether or not it was a separate case to countermeasures.

32. Concluding remarks of the Special Rapporteur on article 30 bis

345. The Special Rapporteur noted that one of the issues that had arisen during the debate was the proper scope of the codified law of treaties in relation to the draft. The Commission, when elaborating the draft that was to become the 1969 Vienna Convention, could have included a section on treaty performance. Yet, under Special Rapporteur Sir Humphrey Waldock, it had deliberately decided not to deal with treaty performance, in the interests of limiting the Convention sufficiently to enable it to be completed. It was clear from the debate, and the Klöckner v. Cameroon case, that the exceptio was not concerned with the termination or suspension of treaty obligations but rather with excuses for non-performance.

346. As to its relationship with existing provisions, the exceptio might be acknowledged to be a distinct case from force majeure, and because it was taken not with a view to forcing the other State to comply, but in response to a prior unlawful act, it might thus be deemed to fall within the same field as countermeasures. Indeed, in his view, it was odd to speak of a breach by another State as being a case of force majeure. One normally thought of force majeure as something that came from outside a relationship between two States, but the exceptio was an aspect of the relationship between two States. In any event, the exceptio was connected in some respect to both force majeure and countermeasures, and that was why he had suggested situating the proposed draft provision between articles 30 and 31.

347. He maintained that it was appropriate, in the light of the legal traditions in this field, to retain the idea of the exceptio as distinct from force majeure and countermeasures, but agreed that its precise formulation and indeed the need for it in the draft could be properly assessed only when the articles on countermeasures had been formulated.

33. Introduction by the Special Rapporteur of article 31 (Force majeure) [215]

348. The Special Rapporteur expressed the view that while article 31 brought together force majeure and fortuitous event, force majeure was not quite the same as fortuitous event, which was more like impossibility of performance. Force majeure was a case in which someone was, by external events, prevented from doing something, and that could include cases of coercion, as already discussed in the context of Chapter IV. It was well established in jurisprudence that the plea of force majeure existed in international law. For example, it was referred to in passing by the Arbitral Tribunal in the Rainbow Warrior case and again by the Court in the Gabcíkovo-Nagymaros Project case, as well as in a number of international treaties.

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[215] The text of article 31 proposed by the Special Rapporteur reads as follows:

> "Force majeure
>
> 1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure. For the purposes of this article, force majeure is the occurrence of an irresistible force or an unforeseen external event beyond the control of the State making it materially impossible in the circumstances to perform the obligation.
>
> 2. Paragraph 1 does not apply if:
>
> (a) The occurrence of force majeure results, either alone or in combination with other factors, from the wrongful conduct of the State invoking it; or
>
> (b) The State has by the obligation assumed the risk of that occurrence."

See A/CN.4/498/Add.2. For the analysis of this article by the Special Rapporteur, see ibid., paras. 250-263.

349. The Special Rapporteur maintained that there was no need to mention the case of fortuitous events. If such events amounted to force majeure, they precluded wrongfulness. If not, they did not need to be mentioned as excuses. At the time of first reading, the Secretariat had produced a survey on force majeure and fortuitous event 216/ which presented no case in which a fortuitous event that should have precluded wrongfulness fell outside a proper understanding of the notion of force majeure.

350. Furthermore, he pointed to a number of drafting problems with the version adopted on first reading. The first was the reference to knowledge of wrongfulness in paragraph 1. There was no general requirement in international law for a State to know that its conduct was not in conformity with an obligation, although a State might need to be aware of a certain factual situation. He proposed a version of article 31 which dealt with the problem.

351. Furthermore, the Special Rapporteur observed that force majeure did not apply under article 31 where a State had contributed to the situation of material impossibility. The problem was that States often so contributed simply as part of a chain of events and without necessarily acting unlawfully or improperly. The exclusion was therefore unduly broad and he had formulated a narrower version of the same exception, based on article 61 of the Vienna Convention on the Law of Treaties, to meet the case.

352. Likewise, article 31 made no allowance for voluntary assumption of risk although it was perfectly clear that, where a State voluntarily assumed the risk of a force majeure situation, the occurrence of such a situation did not preclude wrongfulness.

34. Summary of the debate on article 31

353. Some members expressed support for the Special Rapporteur's proposal to delete the reference to "fortuitous event" from the title, since article 31 was not considered to have dealt with two different situations. Others stated

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216/ Yearbook ... 1978, vol. II, Part One, pp. 61-227.

that the legal consequences of those two distinct circumstances were the same, and the definition of force majeure contained in the version of article 31 adopted on first reading should be retained.

354. It was also suggested that paragraph 1 could benefit from a clearer definition of force majeure which would distinguish between actual or material impossibility of performance and increased difficulty of performance. Reference was made to the Rainbow Warrior arbitration, in which the tribunal had drawn such a distinction by stating that the excuse of force majeure was not relevant because the test of its applicability was that of absolute and material impossibility and because a circumstance which rendered performance more difficult did not constitute force majeure.

355. General support was also expressed for the deletion of the subjective requirement of knowledge of wrongfulness from article 31.

356. With regard to paragraph 2 (a), support was expressed for the proposal by the Special Rapporteur to align it with article 61 of the Vienna Convention on the Law of Treaties. Conversely, some preferred to retain the principle that the State must not have contributed to the occurrence of the situation of material impossibility.

357. The reference to the assumption of risk in paragraph 2 (b) gave rise to some doubts. In view of technological progress, some States might assume obligations whose magnitude they did not fully understand. Hence, it might be wiser to leave the point to the discretion of the judge in each particular case.

358. The observation was made that the draft articles, as they currently stood, made no reference to due diligence as a standard to be applied in the performance of international law obligations. It was agreed to deal with this issue after completing the discussion on Chapter V (see below paras. 416-422).

359. It was also noted that the possibility of the defence of duress might arise in the context of force majeure, and should be considered in that context also (see below paras. 423-425).

35. Concluding remarks of the Special Rapporteur on article 31

360. The Special Rapporteur reiterated his opposition to the reintroduction of the concept of "fortuitous event" in either the title or the body of the article. Not all legal systems regarded the occurrence of a fortuitous event as a circumstance precluding wrongfulness. At the international level, the term "force majeure" had achieved substantial currency, albeit, in most cases, in a commercial context. In article 31, it was sufficient by itself because it covered both "an irresistible force" and "an unforeseen external event". Furthermore, not all unforeseen external events which made it in some sense impossible to do something precluded responsibility.

361. In defence of paragraph 2 (a), the Special Rapporteur noted that it was better than the wording adopted on first reading, which had spoken of the State having "contributed to the occurrence of the situation of material impossibility". In English, the verb "to contribute" did not have the narrower meaning which it had in French, which apparently emphasized the element of intention.

362. In response to the suggestion that the question of the assumption of risk in paragraph 2 (b) be deleted, he argued that the qualification was important, especially as the Commission wanted to give a narrow definition to force majeure. In all legal traditions which recognized force majeure, it was impossible for someone to plead it who had actually assumed the risk of a specific event. In his view, the only question was whether the reference to risk should be included in the article itself or in the commentary.

36. Introduction by the Special Rapporteur of article 32 (Distress) [217]

363. The Special Rapporteur pointed to the importance of noting the difference between distress, on the one hand, and force majeure and necessity, on the other. Distress concerned a situation where a person was responsible for the lives of other persons in his or her care. It was the kind of situation covered by many international instruments, including the 1982 United Nations Convention on the Law of the Sea, and in that context formed part of the primary rules relating to jurisdiction over ships.

364. Yet the issue of distress could also arise in the framework of the secondary rules of State responsibility, despite the argument that the primary rules always covered such situations. In practice, although the primary rules might provide a defence for the individual captain of a ship or might bar the receiving State from exercising jurisdiction, they were not applicable to the issue of State responsibility. Where the captain was a State official, his or her conduct was attributable to the State and raised the question of the responsibility of that State. Hence the need for a draft article on distress.

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[217] The text of article 32 proposed by the Special Rapporteur reads as follows:

> Distress
>
> "1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question reasonably believed that there was no other way, in a situation of distress, of saving that person's own life or the lives of other persons entrusted to his or her care.
>
> 2. Paragraph 1 does not apply if:
>
> (a) The situation of distress results, either alone or in combination with other factors, from the wrongful conduct of the State invoking it; or
>
> (b) The conduct in question was likely to create a comparable or greater peril."

See A/CN.4/498/Add.2. For the analysis of this article by the Special Rapporteur, see ibid., paras. 264-274.

365. A novel feature of article 32 was that its scope had been extended beyond the narrow historical context of navigation to cover all cases in which a person responsible for the lives of others took emergency action to save life. That aspect of article 32 had been generally accepted as a case of progressive development, for example by the Tribunal in the Rainbow Warrior arbitration, which had involved potential medical complications for the individuals concerned. The broad scope of the article should be maintained.

366. He suggested a number of changes in formulation. As situations of distress were necessarily emergency situations, distress should qualify as a circumstance precluding wrongfulness provided the person acting under distress reasonably believed that life was at risk. Even if it turned out subsequently to have been a false alarm, the agent's assessment of the situation seemed to constitute a sufficient basis for action.

367. A Government had raised the question of whether the notion of distress should be extended to cover cases of humanitarian intervention to protect human life, even where the intervening State had no particular responsibility for the persons concerned. It had mentioned the case of police officers crossing a boundary to rescue a person from mob violence. In the Special Rapporteur's view, that was not a situation of distress as historically defined and ought to be covered instead by the defence of necessity.

37. Summary of the debate on article 32

368. Different views were expressed as to the scope of the excuse of distress. On the one hand, support was expressed for the Special Rapporteur's view that it be confined to situations in which human life was at stake, since widening the scope of application of the notion of distress could open up possibilities of abuse. Alternatively, it was queried why a situation of distress should be confined to cases of saving human life, and not include honour or moral integrity.

369. It was also queried in the Commission whether restricting the provision to persons with whom the State had a special relationship was fully in accord with contemporary thinking on human rights law.

370. The view was expressed that the proposed text substantially weakened the existing version by introducing the words "reasonably believed", which greatly broadened the scope of distress.

371. In this regard, the observation was also made that the new wording proposed by the Special Rapporteur changed the spirit of the article by shifting the emphasis from an objective test to a subjective one. Some intermediate possibilities were suggested.

38. Concluding remarks of the Special Rapporteur on article 32

372. The Special Rapporteur, recalling the doubts expressed about the use of the words "reasonably believed", asserted that it was necessary to introduce a more flexible criterion taking into account the conditions under which the author of the act in question has to choose from among the alternatives.

373. In his view, it was not wise to expand the concept of distress to include persons other than those entrusted to the care of the author of the act in question, as stated in article 32. If other persons were involved, the situation was no longer one of compulsion, but, rather, one of moral choice, with which the draft article did not deal.

39. Introduction by the Special Rapporteur of article 33 (Necessity) 218/

374. The Special Rapporteur observed that a state of necessity, as defined in article 33, could be invoked only in extreme cases and to that extent it was comparable to the notion of a "fundamental change of circumstances" in the law of treaties. He noted that there were cases in which the necessity of action was so compelling that it justified a particular form of conduct, for example in relation to the urgent conservation of a species in the Russian Fur Seals

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218/ The text of article 33 proposed by the Special Rapporteur reads as follows:

> "Necessity
>
> "1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless:
>
> (a) The act is the only means of safeguarding an essential interest of that State against a grave and imminent peril; and
>
> (b) The act does not seriously impair:
>
> (i) An essential interest of the State towards which the obligation existed; or
>
> (ii) If the obligation was established for the protection of some common or general interest, that interest.
>
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
>
> (a) The international obligation in question arises from a peremptory norm of general international law; or
>
> (b) The international obligation in question explicitly or implicitly excludes the possibility of invoking necessity; or
>
> (c) The State invoking necessity has materially contributed to the situation of necessity occurring."

See A/CN.4/498/Add.2. For the analysis of this article by the Special Rapporteur, see ibid., paras. 275-291.

case. 219/ Article 33 was referred to by both parties in the Gabcíkovo-Nagymaros Project case, and the Court expressly endorsed it as a statement of general international law.

375. However, there were two important issues to be addressed in connection with necessity. The first was whether necessity as defined in article 33 was the appropriate framework within which to resolve the problem of humanitarian intervention involving the use of force, i.e. action on the territory of another State contrary to Article 2, paragraph 4, of the Charter of the United Nations. Clearly, the defence of necessity could never be invoked to excuse a breach of a jus cogens norm. But it was generally agreed that the rules governing the use of force in the Charter were jus cogens, so that article 33, as it stood, did not cover humanitarian intervention involving the use of force on the territory of another State. Yet the commentary to article 33 argued for a refined version of jus cogens to allow for such intervention and was thus, in his view, inconsistent with the text. Instead, the rules on humanitarian intervention were primary rules that formed part of the regime governing the use of force, a regime referred to - though not exhaustively stated - in the Charter. They were not part of the secondary rules of State responsibility.

376. The second issue, of scientific uncertainty, arose whenever necessity was relied on to justify the conservation of a species or the destruction of a large structure such as a dam which was purportedly in danger of collapse. Prior to the occurrence of the catastrophe, no infallible prediction could be made. The question was whether article 33 made sufficient provision for scientific uncertainty and the precautionary principle, embodied, for example, in the Rio Declaration on Environment and Development as principle 15 and in the World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures, article 5.7.

377. He noted that in the Gabcíkovo-Nagymaros Project case, both parties had recognized the existence of scientific uncertainties but had disagreed about their seriousness. The Court stated that the mere existence of uncertainty was not sufficient to trigger necessity. The WTO Appellate Body had taken a

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219/ Fur Seal Fisheries off the Russian Coast (1893), text in H. La Fontaine, Pasicrisie internationale, 1794-1900, p. 426.

similar view in the Beef Hormones case, 220/ stating that the precautionary principle and the associated notion of uncertainty were not sufficient to trigger the relevant exception. On the other hand, in his view, article 33 should not be formulated so stringently that the party relying on it would have to prove beyond the shadow of a doubt that the apprehended event would occur.

378. He had reluctantly decided against including the precautionary principle in his proposed text for the article, firstly because the International Court of Justice had endorsed article 33 and secondly because necessity stood at the outer edge of the tolerance of international law for otherwise wrongful conduct.

379. He had, however, also proposed an alteration to article 33 to cope with situations in which the balance of interests was not merely bilateral but concerned compliance with an erga omnes obligation. For example, in the South West Africa cases, 221/ the implicit argument for South Africa was that the policy of apartheid in South West Africa was necessary for good governance of the territory. However, the question did not affect the individual interests of Ethiopia or Liberia but the interests of the people of South West Africa.

40. Summary of the debate on article 33

380. It was queried in the Commission whether article 33 was necessary. Doubts were expressed regarding its implementation in practice. In terms of this view, the need to avoid any abuse which might be based on the provision justified its deletion.

381. However, it was conceded that as necessity was generally recognized in customary international law as a circumstance precluding the wrongfulness of an act not in conformity with an international obligation, article 33 could not be entirely deleted. Yet, in order to prevent abuse, it should be formulated with very strict conditions and limitations on its application.

220/ EC measures concerning Meat and Meat Products (Hormones), report of the Appellate Body, 16 January 1998, para. 94.

221/ South West Africa Second Phase, Judgment, I.C.J. Reports 1966, p. 6.

382. Support was expressed for the view that the criterion was not, in all cases, the individual interest of the complaining State but the general interest protected by the obligation.

383. Likewise, in supporting the reference to "the protection of some common or general interest" in paragraph 1 (b) (ii), it was queried whether it would not be desirable to indicate that necessity could be invoked not only as a factor in balancing the interests of the invoking State with those of the victim State but also as between the interests of the invoking State and those of the international community as a whole, for example in the case of a ship polluting the high seas by dumping dangerous chemicals.

384. The Commission's attention was drawn to the danger of abusive reliance on the concept of humanitarian intervention. It was also observed that in view of the controversy over that concept, the Commission should, as in the past, refrain from taking a position on it when formulating secondary rules of State responsibility. It was also suggested that while humanitarian intervention was not really regulated in article 33, it would nevertheless be better to make that point in the commentary to ensure that state of necessity was not improperly invoked.

385. In response, the Special Rapporteur pointed out that the question of humanitarian intervention was governed by substantive international law and above all by the Charter of the United Nations. As such, it was not governed by article 33 of the draft and hence there was no difficulty attaching to the exclusion of peremptory norms from the scope of that article. In his view, therefore, it would not be useful for the Commission to take a position on the extremely controversial issue of humanitarian intervention involving the use of force.

386. Support was expressed for the Special Rapporteur's position on the precautionary principle.

387. Support was expressed for the position in paragraph 2 (a) that necessity could not be invoked if the international obligation arose from a peremptory

norm of general international law. It was recommended that this exception be extended to all circumstances precluding wrongfulness in a general article.

41. Concluding remarks of the Special Rapporteur on article 33

388. The Special Rapporteur pointed to a clear consensus in the Commission in favour of providing the narrowest possible definition of necessity in terms of precluding wrongfulness and also in favour of maintaining the article adopted on first reading.

389. He observed further that the Commission also seemed to take the view that article 33 did not cover the use of force because paragraph 2 excluded the violation of a peremptory norm of general international law. Similarly, the article could not be used as the vehicle for a debate on the question of humanitarian intervention involving use of force in the territory of another State.

390. He did not fully support the view that responsibility should be precluded in the event of a violation of a peremptory rule of law within the framework of Chapter V. While it was relevant to consent as well as necessity, he could not see how such a situation could arise in connection with distress. In his view, it would be better to prepare a more general provision and try to find an appropriate place for it in the draft. He thus favoured maintaining article 33, paragraph 2, in the form adopted on first reading.

391. The Special Rapporteur noted further that the discussion had shown that the inclusion of a clause on the precautionary principle in article 33 would be difficult.

42. Introduction by the Special Rapporteur of article 34 bis (Procedure for invoking a circumstance precluding wrongfulness) 222/

392. The Special Rapporteur observed that it was clear that where a State relied on a circumstance precluding wrongfulness, that reliance had a temporary effect only. On balance, this was sufficiently clear in the draft articles. However, he proposed a new article 34 bis dealing with the procedure for invoking a circumstance precluding wrongfulness. The key point to note was that by and large circumstances precluding wrongfulness operated automatically: a situation of distress or force majeure arose in relation to performance due at that time. So it was not necessarily a case of giving advance notice of the circumstance, although notice should be given if possible.

393. Paragraph 1, proposed an information and consultation procedure whereby the State invoking circumstances precluding wrongfulness was required, as a minimum, to inform the other State that it was doing so.

394. The article also contained, in paragraph 2, a basic dispute settlement provision, serving merely as a reminder and enclosed within square brackets. He explained that it was not necessary for the Commission to enter into the detail of paragraph 2, until it turned to the question of dispute settlement generally and decided on the status it would propose for the draft as a whole.

222/ The text of article 34 bis proposed by the Special Rapporteur reads as follows:

> "Procedure for invoking a circumstance precluding wrongfulness
>
> 1. A State invoking a circumstance precluding wrongfulness under this Chapter should, as soon as possible after it has notice of the circumstance, inform the other State or States concerned in writing of it and of its consequences for the performance of the obligation.
>
> [2. If a dispute arises as to the existence of the circumstance or its consequences for the performance of the obligation, the parties should seek to resolve that dispute:
>
> (a) In a case involving article 29 bis, by the procedures available under the Charter of the United Nations;
>
> (b) In any other case, in accordance with Part Three.]"

See A/CN.4/498/Add.2. For the analysis of this article by the Special Rapporteur, see ibid., paras. 335-352.

43. Summary of the debate on article 34 bis

395. As to paragraph 1, the view was expressed that it was a sound contribution to the progressive development of international law that would help to temper the occasional enthusiasm of States for the invocation of circumstances precluding wrongfulness.

396. As to the provision's formulation, doubts were expressed regarding the use of the word "should" in paragraph 1. It was queried whether it would apply in all cases or only in circumstances in which such action could contribute to the mitigation of damages? The view was also expressed that the words "in writing" also suggested a rigour and formality that was out of place. Furthermore, doubts were expressed concerning the use of the words "as soon as possible", which was thought to considerably weaken the provision's impact.

397. General support was expressed in the Commission for the deletion of paragraph 2 since it pertained to a different issue, namely dispute settlement. Furthermore, it prejudged the form of the future articles - only a convention could provide for binding means of settlement of disputes.

44. Concluding remarks of the Special Rapporteur on article 34 bis

398. The Special Rapporteur explained that he had deliberately used the word "should" in paragraph 1 because, while he supported the progressive development of international law that it entailed, he did not wish to give the impression of creating a new primary obligation to inform.

399. With regard to the words "in writing", the problem with unwritten communications was that they were difficult to prove. He cited the example of the invocation in writing of a state of necessity in the Gabcíkovo-Nagymaros Project case as support for his view that State practice revealed that the formal invocation of circumstances precluding wrongfulness was taken seriously.

400. Furthermore, article 34 bis, paragraph 2, did not prejudice the form of the draft articles or the question of dispute settlement. However, he would be willing to omit it on the understanding that the issue would be addressed in the framework of Part Three.

401. Similarly, it was only after consideration of the important elements of Part Three to be presented at the next session that the Commission would be

able to take a final decision as to where article 34 bis belonged. In the meantime, he agreed with the view that the existing placement of article 34 bis was appropriate.

45. Introduction by the Special Rapporteur of article 35 (Consequences of invoking a circumstance precluding wrongfulness) 223/

402. The Special Rapporteur pointed out that some States had criticized article 35 as adopted on first reading for envisaging no-fault liability. In fact, it would have done so only if it had stated that there was no element of fault in a situation in which a State was excused from performance, something which was, *a priori*, unlikely. With no element of fault, as in the case of self-defence, there was no room for compensation save as provided by the primary rules in respect of incidental injury to third parties. In some cases, however, it seemed desirable to envisage compensation.

403. He therefore argued strongly that, at least in cases where circumstances precluding wrongfulness were an excuse rather than a justification, i.e. that might be classified as cases of circumstances precluding responsibility as opposed to wrongfulness, the draft articles should expressly envisage the possibility of compensation.

404. In article 35, in addition to financial compensation in cases of distress and necessity, he had also included a provision expressly dealing with cessation, reflecting the Court's findings on that subject in the *Gabcíkovo-Nagymaros Project* case. He had not, however, envisaged compensation

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223/ The text of article 35 proposed by the Special Rapporteur reads as follows:

> "Consequences of invoking a circumstance precluding wrongfulness
>
> The invocation of a circumstance precluding wrongfulness under this Chapter is without prejudice:
>
> (a) To the cessation of any act not in conformity with the obligation in question, and subsequent compliance with that obligation, if and to the extent that the circumstance precluding wrongfulness no longer exists;
>
> (b) In the case of articles 32 and 33, to the question of financial compensation for any actual harm or loss caused by that act."

See A/CN.4/498/Add.2. For the analysis of this article by the Special Rapporteur, see ibid., paras. 336-347.

in cases of force majeure, still less in cases of consent. It had seemed rather anomalous to say that consent made the act lawful but that nonetheless compensation must be paid.

46. Summary of the debate on article 35

405. Support was expressed for subparagraph (a), dealing with an issue that had been carefully addressed by the International Court in the Gabcíkovo-Nagymaros Project case.

406. With regard to subparagraph (b), it was noted that the provision raised the question of the legal basis for such compensation, since it related to acts which were not wrongful. It therefore arose either from responsibility for harm as a result of acts which were not wrongful or out of obligations stemming from the causing of harm. Neither concept had a sufficient basis in international law.

407. As to the scope of subparagraph (b), it was queried whether there were also cases of innocent third States which incurred damage arising out of self-defence or countermeasures. Similarly, it was noted that in the case of force majeure, it was not inconceivable that other States might suffer more than the State invoking it.

408. In this regard, two possible criteria were suggested for determining cases in which compensation should or should not be envisaged. The first involved the application of article 35 to cases where the circumstance precluding wrongfulness operated as an excuse rather than a justification. Alternatively, if the conduct of the "target" State had been wrongful, there was no basis to compensate it, whereas a State should pay compensation for infringing the rights and interests of an innocent State.

409. A view was expressed that article 35 addressed an issue that belonged in another part of the draft, since it concerned implementation. Furthermore, it was observed that the proposed title of the article was misleading because the main consequence of invoking a circumstance precluding wrongfulness was that no compensation was due, inasmuch as the normal consequences of a breach of obligation had been ruled out. The article thus dealt with exceptional consequences rather than consequences in general.

47. Concluding remarks of the Special Rapporteur on article 35

410. The Special Rapporteur took note of the view that it was undesirable to limit article 35 (b), to articles 32 and 33 and also deferred to the view that the Commission should not attempt to elaborate in detail the content and bases for compensation.

48. Further justifications or excuses

(a) "Clean hands" doctrine

411. In referring to the so-called "clean hands" doctrine, the Special Rapporteur noted that, in his view, if it existed at all, it corresponded to the doctrine of inadmissibility in proceedings and was not a circumstance precluding wrongfulness. 224/

412. The view was expressed that the clean hands rule had nothing to do with the *exceptio inadimpleti contractus* applied to the law of State responsibility, and that it was not yet part of general international law, and hence should not be included in the draft. It was pointed out in that regard that it would be possible to revert to the idea in the discussion on diplomatic protection, but, even in that area, the principle was not generally recognized.

413. These views were disputed in the Commission where it was noted that the clean hands rule was a basic principle of equity and justice. Hence, considering it would be in line with the Commission's purpose to promote the progressive development of international law and its codification.

414. Indeed, the view was expressed that the "clean hands" doctrine was a principle of positive international law. That principle came under the determination of responsibility because it had an impact on the scope of compensation; the wrongfulness nevertheless persisted and it thus was not a circumstance precluding wrongfulness. Hence, the doctrine should, instead, be taken up during the consideration of Part Two of the draft articles, given its importance for the scope of compensation and the existence of the obligation to compensate.

415. The Special Rapporteur observed that of those who had spoken on the subject no one had wanted the doctrine to be mentioned in Chapter V of Part One. That was to be welcomed, since the "clean hands" argument, in any

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224/ For an analysis of the doctrine see A/CN.4/498/Add.2, paras. 330-334.

of its versions, could not be advanced as an excuse for unlawfulness. In his view, the doctrine could be analysed subsequently in connection with the loss of the right to invoke State responsibility.

(b) Due diligence

416. Reference was made during the debate on article 31, force majeure, that in the codification of State responsibility, the degree of diligence shown by a State should be addressed as a matter of secondary rules in a general and comprehensive way.

417. It was noted further that by deleting any reference to fortuitous event in draft article 31, the only defence available to a State accused of a breach of international law and trying to argue that it had done everything that could have reasonably been expected of it under the circumstances would be to claim force majeure. But force majeure was particularly unfit to accommodate, for example, a claim of a breach of an obligation of prevention.

418. Two solutions were proposed. The first would be to include a reference to due diligence in the context of Chapter III, which defined the breach of an international obligation, and the second would be to have such a reference in the framework of Chapter V.

419. In response, it was pointed out that due diligence and the subjective element were general concepts that permeated the entire draft. As such, it would be preferable to take them up at the end of consideration of the topic in the context of other issues.

420. The Special Rapporteur stated that the issue of force majeure as formulated on first reading was a different matter from the question of due diligence. In practice, force majeure was taken to be distinct from the general principle of fault. Defining the precise nature of due diligence could not be done in the context of the draft articles without spending many more years on the topic and, even if the problem were resolved, that would in effect be based on the presumption that any primary rule, or most primary rules, contained a qualification of due diligence.

421. A suggestion was made that the Commission should confine itself to the most important and most urgent aspects of the topic, thereby indicating that it did not rule out the possibility that the regime of State responsibility also encompassed other rules. Hence, the matter could be covered by an appropriate "without prejudice" clause.

422. The Special Rapporteur pointed out that the discussion had brought to light a real problem of differentiation between primary and secondary rules. As such, the draft articles would have to include a provision comparable to article 73 of the Vienna Convention on the Law of Treaties, i.e. a "without prejudice to" clause that would clarify the scope of the draft articles.

(c) Duress

423. The view was expressed in the context of the debate on article 31 (force majeure and fortuitous event) that it was regrettable that duress had not been contemplated as a circumstance precluding wrongfulness. It was not clear whether it was covered by the articles on force majeure, distress or even state of necessity.

424. It was suggested that, while not necessarily drawing a parallel with articles 51 and 52 of the Vienna Convention on the Law of Treaties, the Commission should at least recognize that duress as a circumstance precluding wrongfulness arose in specific cases and should be discussed at some stage. It was further noted that duress as a ground for excluding individual criminal responsibility was specifically mentioned in article 31, paragraph 1 (d), of the Rome Statute of the International Criminal Court. Hence, a case existed for including duress by way of analogy in the draft articles on State responsibility or at least mentioning it in the commentary.

425. In response, the Special Rapporteur maintained that all the circumstances which justified the termination of a treaty according to the Vienna Convention were already sufficiently covered in Chapter V of the Commission's draft. Furthermore, the problem of coercion had already been discussed in connection with Chapter IV, when it had emerged that most cases of coercion could be reduced to a situation of force majeure, dealt with in article 31. Coercion as a defect in the will of the State (as distinct from a case of force majeure) was adequately dealt with in article 52 of the Vienna Convention on the Law of Treaties. In this regard, it should be noted that such a defect could be cured by subsequent uncoerced consent or acquiescence. This situation did not need to be covered in Chapter V.

49. Countermeasures [225]

(a) Introduction by the Special Rapporteur

426. Following its preliminary debate on article 30 (countermeasures) in the context of Chapter V of Part One, the Commission had decided to retain an article on countermeasures in Chapter V, but deferred finalizing the text of the article until its consideration of countermeasures in Chapter III of Part Two (see paras. xx-xxx).

427. The Special Rapporteur subsequently presented addendum 4 to his second report, in which he posed several questions regarding the regime of countermeasures with a view to obtaining the guidance of the Commission in preparing his next report.

428. He pointed out that the Commission had accepted the view that it was very difficult to formulate a satisfactory article 30, without knowing whether the issue of countermeasures was going to be dealt with in more detail in Part Two. He recommended that the Commission limit itself, at its present session, to considering the prior question of whether articles 47-50 should be included at all, in whatever form.

429. Comments of Governments on the question had been diverse. Some had argued for the suppression of the articles on countermeasures entirely. Others, while broadly favouring the institution of countermeasures, called for extensive changes in the articles in Part Two, but not their suppression. A further group favoured the existing articles on countermeasures in Part Two.

430. Furthermore, he brought to the Commission's attention the fact that the International Court of Justice had, in the Case concerning the Gabcíkovo-Nagymaros Project, for the first time in its modern history dealt with the problem of countermeasures. While the Court did not doubt that countermeasures may justify otherwise unlawful conduct, it had not relied on

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[225] The text of article 30 proposed by the Special Rapporteur reads as follows:

> "Countermeasures in respect of an internationally wrongful act
>
> "The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if and to the extent that the act constitutes a lawful countermeasure as provided for in articles [xx]-[xx]."

See A/CN.4/498/Add.4.

the exact formulation of the articles on countermeasures in Part Two. He viewed this as evidence of the Court's impression that the articles on countermeasures were not yet in a fully-formed state, while recognizing that they expressed an appropriate general approach.

431. The first issue requiring clarification concerned the question of dispute settlement in the draft articles, since it was difficult to take a view on the question of countermeasures without forming a view on dispute settlement. The provisions on countermeasures in Part Two, as adopted on first reading, assumed that the draft articles would deal with dispute settlement in the form of a convention. But that assumption could not be taken for granted.

432. The second, more specific issue, concerned the linkage between countermeasures in Part Two and dispute settlement. He noted that under the draft articles, if countermeasures were taken, the "target" State, i.e. the State against whom they are taken and which had been said to have committed the internationally wrongful act, was entitled to unilaterally force the State taking the countermeasures, i.e. the "injured State", to go to compulsory arbitration. This was the only compulsory third party judicial settlement of disputes procedure provided for in the draft articles

433. He observed that, from a policy standpoint, it was undesirable to limit the right to settlement of disputes to the State which had ex hypothesi committed a wrongful act. It was also unusual to do so by reference to the substantive legal classification of countermeasures, which was difficult to distinguish in practice from, for example, retorsion. He cited the parallel of the International Tribunal of the Law of the Sea in the MV Saiga case, 226/ where the Tribunal had been faced with an analogous difficulty in establishing jurisdiction on the basis of the substantive legal classification in question.

434. Furthermore, this arrangement gave injured States a positive incentive to take countermeasures, and even excessive countermeasures, because by doing so they could force the target State to go to arbitration.

435. He also pointed out that the draft articles adopted on first reading distinguished between interim measures of protection and countermeasures in the normal sense. The former referred to measures that can be taken

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226/ Application for Prompt Release, judgment of 4 December 1997, para. 72.

immediately upon the happening of the unlawful act, without notification, and without negotiation. But full-scale countermeasures could only be taken after negotiations had failed. He noted that the problem with this distinction was that it used the terminology of interim measures of protection which was inappropriate because it implied the existence of a court or tribunal. Furthermore, the definition of interim measures of protection as actually given was merely another way of defining countermeasures, in other words, there was no clear distinction in language between the two.

436. He expressed the firm view that the linkage in Part Two between countermeasures and dispute settlement was unworkable and could not be sustained. As such, it was best replaced with provisions that would require States to do whatever they could to resolve disputes, but which would not link the taking of countermeasures to judicial settlement.

437. The Special Rapporteur identified four options open to the Commission with regard to article 30: (1) to retain article 30 in essentially its present form, but to delete the treatment of countermeasures in Part Two; (2) not to deal with countermeasures in Part Two, but to incorporate substantial elements of the legal regime of countermeasures into article 30; (3) to engage in a substantial treatment of countermeasures in Part Two, along the lines of the present text, including the linkage with dispute settlement; or (4) to deal with countermeasures in Part Two but avoiding any specific linkage with dispute settlement. He expressed his preference for the last option. On that basis he proposed a draft text for article 30.

(b) Summary of the debate

438. Support was expressed for the recognition that the institution of countermeasures exists in international law, as was reflected in recent judicial decisions, as well as in the Commission's own decision to include an article on countermeasures in Chapter V of Part One. Support was also expressed by some for the inclusion of some substantive treatment of countermeasures in Part Two, with a view to strictly regulating their application.

439. In this regard, it was noted that those who oppose countermeasures should by definition support strict limitations in the draft articles. The

view that countermeasures should not be dealt with in the draft articles at all, was, in effect, a view in favour of few limitations on the taking of countermeasures.

440. Furthermore, it was observed that while the Commission could take the approach of only referring to "lawful" countermeasures, without defining such measures, as in the context of "lawful" self-defence, countermeasures were closely linked to State Responsibility and therefore called for the inclusion in the draft articles of specific rules on their application.

441. Support was expressed for the fourth option in the Special Rapporteur's report, namely to delink the taking of countermeasures under Part Two from resort to international dispute settlement. Some urged avoiding prejudice to the possibility of option two.

442. It was noted that international dispute settlement mechanisms are too time-consuming to be linked to countermeasures, and may lead to abuse in the form of delaying tactics by the target State. Likewise, the linkage was viewed as creating an elaborate and complex system, that would rely on the willingness of States to submit to such an arrangement. Similarly, it was noted that it would be untenable to have the resort to countermeasures subject to the exhaustion of dispute settlement procedures.

443. However, the view was expressed that delinking the two would necessitate strict limitations on the taking of countermeasures, and should not prejudice a more general provision dealing with the relation between dispute settlement procedures and the taking of countermeasures.

444. A further view was expressed that delinking countermeasures and dispute settlement could be viable if the draft articles included a general regime for third party dispute settlement.

445. On the other hand, doubts were expressed regarding the Special Rapporteur's evaluation of the linkage between countermeasures and dispute settlement as flawed. It was noted that the linkage was not envisaged as only providing the injuring State with the right to call for compulsory dispute settlement. Instead, it was expected that the original wrong would also be included as part of the settlement of the dispute as an ancillary matter to the taking of the countermeasures.

446. In this regard, some support was expressed for a linkage between countermeasures and compulsory dispute settlement. They were regarded as two

sides of the same coin, and as striking a balance between the interests of the injured States and those States finding themselves at the receiving end of the countermeasures. Furthermore, it was noted that, because of their controversial nature and the possibility of abuse, countermeasures could only be acceptable when coupled with compulsory dispute settlement, since it would provide a strict limitation on their application.

447. The better solution, therefore, would be for the Commission to address the imbalance in the treatment of States inherent in the linkage, instead of opting for delinkage.

448. While general support was expressed for sending the proposed text of article 30 to the Drafting Committee, it was observed that the text assumed that the substantive and procedural requirements for the taking of countermeasures were spelt out elsewhere in the draft. As such, it potentially prejudiced the outcome of the Commission's consideration of countermeasures in Part Two. It was thus proposed to refer both the text of draft article 30 adopted on first reading, as well as that proposed by the Special Rapporteur, to the Drafting Committee.

449. The view was also expressed that countermeasures were not necessarily to be regarded as part of the content, form or degree of responsibility in Part Two. The possibility of taking countermeasures could not be seen as a consequence of wrongful acts in the same category as reparation or cessation. Instead, countermeasures were best viewed as an instrument to ensure compliance with the obligation, reparation or cessation, and were related to the implementation (mis en oeuvre) of international responsibility. It was thus proposed that countermeasures be dealt with in a new Part Two bis, which could include the admissibility of claims, countermeasures, and collective measures.

(c) Concluding remarks of the Special Rapporteur on countermeasures

450. The Special Rapporteur noted that a minority in the Commission preferred retaining the linkage between countermeasures and Part Three. However, even they did not defend the inequality that existed in the relationship between the taking of countermeasures and dispute settlement. Instead, a close relationship was supported out of concern for the danger of possible abuse inherent in countermeasures and the need to control them as much as possible.

451. He explained that his proposal to delink the two did not prejudice the position that issues arising out of the resort to countermeasures could be the subject of dispute settlement. Yet, it was untenable to make compulsory dispute settlement procedure in the draft articles available only to the State which had committed the internationally wrongful act.

452. He noted further that the call for equality in treatment between States within the existing arrangement, was really a call for a general system of dispute settlement in relation to the draft articles. While this would not be precluded by the debate, it implied that the draft articles would have to take the form of a draft convention, which had not yet been decided.

453. The Special Rapporteur expressed particular interest in the proposal to have a Part Two bis, on implementation, in the draft articles.

CHAPTER VI

RESERVATIONS TO TREATIES

A. Introduction

454. The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the International Law Commission to include in its agenda the topic "The law and practice relating to reservations to treaties".

455. At its forty-sixth session, in 1994, the Commission appointed Mr. Alain Pellet Special Rapporteur for the topic. 227/

456. At its forty-seventh session, in 1995, the Commission received and discussed the first report of the Special Rapporteur. 228/

457. Following that discussion, the Special Rapporteur summarized the conclusions he had drawn from the Commission's consideration of the topic; they related to the title of the topic, which should now read "Reservations to treaties"; the form the results of the study would take which should be a guide to practice in respect of reservations; the flexible way in which the Commission's work on the topic should be carried out; and the consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions. 229/ In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994. As far as the Guide to practice is concerned, it would take the form of draft guidelines with commentaries which would be of assistance for the practice of States and international organizations; these guidelines would, if necessary, be accompanied by model clauses.

458. In 1995, the Commission, in accordance with its earlier practice,230/ authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems

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227/ Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10), para. 382.

228/ A/CN.4/470 and Corr.1.

229/ Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 491.

230/ See Yearbook of the International Law Commission, 1993, vol. II (Part Two), para. 286.

encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions. The questionnaire was sent to the addressees by the Secretariat. In its resolution 50/45 of 11 December 1995, the General Assembly took note of the Commission's conclusions, inviting it to continue its work along the lines indicated in its report and also inviting States to answer the questionnaire. 231/

459. At its forty-eighth session, the Commission had before it the Special Rapporteur's second report on the topic. 232/ The Special Rapporteur had annexed to his report a draft resolution of the International Law Commission on reservations to multilateral normative treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to and clarifying the legal aspects of the matter. 233/ Owing to lack of time, however, the Commission was unable to consider the report and the draft resolution, although some members had expressed their views on the report. Consequently, the Commission decided to defer the debate on the topic until the next year.

460. At its forty-ninth session, the Commission again had before it the second report of the Special Rapporteur on the topic.

461. Following the debate, the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties. 234/

462. In its resolution 52/156 of 15 December 1997, the General Assembly took note of the Commission's preliminary conclusions and of its invitation to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide, in writing, their comments and observations on the conclusions,

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231/ As of 30 June 1999, 33 States and 22 international organizations had answered the questionnaire.

232/ A/CN.4/477 and Add.1.

233/ Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), para. 137.

234/ Ibid., Fifty-second Session, Supplement No. 10 (A/52/10), para. 157.

while drawing the attention of Governments to the importance for the International Law Commission of having their views on the preliminary conclusions.

463. At its fiftieth session, the Commission had before it the Special Rapporteur's third report on the topic [235] which dealt with the definition of reservations and interpretative declarations to treaties. Due to lack of time, the Commission could not consider the third report in its entirety. It only considered part of it and referred to the Drafting Committee 10 draft guidelines included in the third report: 1.1 (Definition of reservations), 1.1.1 (Joint formulation of a reservation), 1.1.2 (Moment when a reservation is formulated), 1.1.3 (Reservations formulated when notifying territorial application), 1.1.4 (Object of reservations), 1.1.5 (Statements designed to increase the obligations of their author), 1.1.6 (Statements designed to limit the obligations of their author), 1.1.7 (Reservations relating to non-recognition), 1.1.8 (Reservations having territorial scope), 1.2 (Definition of interpretative declarations) and 1.4 (Scope of definition). Those draft guidelines would be part of the Guide to practice.

464. On the recommendation of the Drafting Committee, the Commission provisionally adopted at the same session draft guidelines 1.1 (Definition of reservations), 1.1.1 [1.1.4] (Object of reservations), 1.1.2 (Cases in which a reservation may be formulated), 1.1.3 [1.1.8] (Reservations having territorial scope), 1.1.4 [1.1.3] (Reservations formulated when notifying territorial application), 1.1.7 [1.1.1] (Reservations formulated jointly) and a draft guideline with no title or number concerning the relation between the definition and the permissibility of reservations. [236]

465. The Commission also adopted commentaries to the above draft guidelines. Draft guidelines 1.1.5, 1.1.6, 1.1.7 and 1.2 were still before the Drafting Committee, while draft guidelines 1.1.1 and 1.1.3 were provisionally adopted on the understanding that they would be re-examined in the light of discussion

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[235] A/CN.4/491 and Corr.1 (English only), A/CN.4/491/Add.1, Add.2 and Add.2/Corr.1, Add.3 and Corr.1 (Chinese, French and Russian only), Add.4 and Add.4/Corr.1, Add.5 and Add.6 and Corr.1.

[236] See Report of the International Law Commission on the work of its fiftieth session, Official Records of the General Assembly, Fifty-third Session, Supplement No. 10 (A/53/10), para. 540.

on interpretative declarations and could be reformulated if necessary. Moreover the guideline with no title or number was provisionally adopted by the Commission on the understanding that the Commission would consider the possibility of referring, under a single caveat, both to reservations, which were provisionally the sole object of that guideline and to interpretative declarations which, in the view of some members, posed identical problems.

B. Consideration of the topic at the present session

466. At the present session, the Commission had again before it the part of the Special Rapporteur's third report which it could not consider at its fiftieth session and the first part of his fourth report on the topic. [237] Moreover the revised bibliography on reservations to treaties which was originally submitted by the Special Rapporteur in 1996 attached to his second report was annexed to the report. [238]

467. The Commission considered the remaining part of the Special Rapporteur's third report and part of his fourth report at its 2581st to 2586th meetings held from 3 to 11 June and referred to the Drafting Committee draft guidelines 1.1.9 ("Reservations" to bilateral treaties), 1.2.1 (Joint formulation of interpretative declarations), 1.2.2 (Phrasing and name), 1.2.3 (Formulation of an interpretative declaration when a reservation is prohibited), 1.2.4 (Conditional interpretative declarations), 1.2.5 (General statements of policy), 1.2.6 (Informative declarations), 1.2.7 (Interpretative declarations in respect of bilateral treaties), 1.2.8 (Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party), 1.3.1 (Method of distinguishing between reservations and interpretative declarations). [239] Moreover, the Special

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[237] A/CN.4/499.

[238] A/CN.4/478/Rev.1.

[239] The text of these draft guidelines can be found in document A/CN.4/491/Add.6.

Rapporteur introduced a revised version of draft guideline 1.1.7 (1.1.7 bis) ("Statements of non-recognition") which was already before the Drafting Committee. This revised version of this draft guideline was included in his fourth report. [240]

468. With regard to draft guidelines 1.3.0, 1.3.0 bis and 1.3.0 ter, appearing also in the Special Rapporteur's third report and dealing with the distinction between reservations and interpretative declarations, [241] the Special Rapporteur had proposed them only tentatively. His main objective was to determine a series of criteria stemming from the general definition of reservations and interpretative declarations. The Commission was of the view however that these criteria were already inherent in the definitions and that these three draft guidelines would merely repeat them or overlap with them without adding a new element. The Commission decided not to refer them to the Drafting Committee but to reflect their content in the relevant commentaries to draft guidelines on this issue.

469. The Commission considered the report of the Drafting Committee at its 2597th to 2599th meetings from 6 to 8 July 1999 and adopted on first reading 18 draft guidelines. Moreover in light of the consideration of interpretative declarations it adopted a new version of draft guideline 1.1.1 [1.1.4] and of the draft guideline without a title or number (in the new version draft guideline 1.6 (Scope of definitions)). The text of these draft guidelines and of the commentaries relating thereto is reproduced in section C below.

C. Text of the draft guidelines on reservations to treaties provisionally adopted by the Commission on first reading

1. Text of the draft guidelines

470. The text of the draft guidelines provisionally adopted by the Commission at its fiftieth and fifty-first sessions is reproduced below.

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[240] A/CN.4/499, para. 53.

[241] The text of the draft guidelines can also be found in document A/CN.4/491/Add.6.

RESERVATIONS TO TREATIES

Guide to Practice

1. Definitions

1.1 Definition of reservations 242/

"Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

1.1.1 [1.1.4] 243/ Object of reservations

A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to the State or to the international organization which formulates the reservation.

1.1.2 Instances in which reservations may be formulated 244/

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Conventions of 1969 and 1986 on the law of treaties.

242/ For the commentary to this draft guideline, see Report of the International Law Commission on the work of its fiftieth session, Official Records of the General Assembly, Fifty-third Session, Supplement No. 10 (A/53/10), pp. 196-199.

243/ The numbers in square brackets refer to the numbering in the third report of the Special Rapporteur (A/CN.4/491 and Add.1-6).

244/ For the commentary to this draft guideline, see Report of the International Law Commission on the work of its fiftieth session, op. cit., pp. 203-206.

1.1.3 [1.1.8] Reservations having territorial scope [245]

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement, constitutes a reservation.

1.1.4 [1.1.3] Reservations formulated when notifying territorial application [246]

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of a treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

1.1.5 [1.1.6] Statements purporting to limit the obligations of their author

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.

1.1.6 Statements purporting to discharge an obligation by equivalent means

A unilateral statement formulated by a State or an international organization when that State or that organization expresses its consent to be bound by a treaty by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from but equivalent to that imposed by the treaty constitutes a reservation.

1.1.7 [1.1.1] Reservations formulated jointly [247]

The joint formulation of a reservation by several States or international organizations does not affect the unilateral nature of that reservation.

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[245] The text of this draft guideline was reviewed together with guideline 1.1.1 at the fifty-first session of the Commission. See para. 465 above. The Commission decided that it was not necessary to modify the drafting of this draft guideline. For the commentary to this draft guideline, see Report of the International Law Commission on the work of its fiftieth session, op. cit., pp. 206-209.

[246] For the commentary to this draft guideline, ibid., pp. 209-210.

[247] For the commentary to this draft duideline, ibid., pp. 210-213.

1.2 Definition of interpretative declarations

"Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.

1.2.1 [1.2.4] Conditional interpretative declarations

A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.

1.2.2 [1.2.1] Interpretative declarations formulated jointly

The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral nature of that interpretative declaration.

1.3 Distinction between reservations and interpretative declarations

The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.

1.3.1 Method of implementation of the distinction between reservations and interpretative declarations

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

1.3.2 [1.2.2] Phrasing and name

The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

1.3.3 [1.2.3] Formulation of a unilateral statement when a reservation is prohibited

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author.

1.4 Unilateral statements other than reservations and interpretative declarations

Unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations are outside the scope of the present Guide to practice.

1.4.1 [1.1.5] Statements purporting to undertake unilateral commitments

A unilateral statement formulated by a State or an international organization in relation to a treaty, whereby its author purports to undertake obligations going beyond those imposed on it by the treaty constitutes a unilateral commitment which is outside the scope of the present Guide to practice.

1.4.2 [1.1.6] Unilateral statements purporting to add further elements to a treaty

A unilateral statement whereby a State or an international organization purports to add further elements to a treaty constitutes a proposal to modify the content of the treaty which is outside the scope of the present Guide to practice.

1.4.3 [1.1.7] Statements of non-recognition

A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize constitutes a statement of non-recognition which is outside the scope of the present Guide to practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

1.4.4 [1.2.5] General statements of policy

A unilateral statement formulated by a State or by an international organization whereby that State or that organization expresses its views on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, constitutes a general statement of policy which is outside the scope of the present Guide to practice.

1.4.5 [1.2.6] Statements concerning modalities of implementation of a treaty at the internal level

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without purporting as such to affect its rights and obligations towards the other contracting parties, constitutes an informative statement which is outside the scope of the present Guide to practice.

1.5 Unilateral statements in respect of bilateral treaties

1.5.1 [1.1.9] "Reservations" to bilateral treaties

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty to which it is subjecting the expression of its final consent to be bound, does not constitute a reservation within the meaning of the present Guide to practice.

1.5.2 [1.2.7] Interpretative declarations in respect of bilateral treaties

Draft guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties.

1.5.3 [1.2.8] Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes the authentic interpretation of that treaty.

1.6 Scope of definitions

The definitions of unilateral statements included in the present chapter of the Guide to practice are without prejudice to the permissibility and effects of such statements under the rules applicable to them.

2. Text of the draft guidelines with commentaries thereto adopted at the fifty-first session of the International Law Commission

RESERVATIONS TO TREATIES

Guide to Practice

1. Definitions

...

1.1.1 [1.1.4] Object of reservations 248/

A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects, in their application to the State or to the international organization which formulates the reservation.

Commentary

(1) Taken literally, the Vienna definition 249/ appears to exclude from the general category of reservations unilateral statements that concern not one specific provision or a number of provisions of a treaty, but the entire text. The aim of draft guideline 1.1.1 is to take into account the well-established practice of across-the-board reservations in the interpretation of this definition, a simple reading of which would lead to an interpretation that was too restrictive and contrary to the reality.

(2) The wording used by the authors of the Vienna Conventions takes care to make it clear that the objective of the author of the reservation is to

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248/ An initial commentary to this draft guideline was published in the report of the International Law Commission on the work of its fiftieth session, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 199-203; footnote 215 to that commentary read: "This draft guideline will be re-examined in the light of the discussion on interpretative declarations and could be reformulated if necessary". At its fifty-first sesion, the Commission re-examined the draft guideline and amended its wording; the present commentary therefore replaces the one published in 1998. The original text read: "A reservation may relate to one or more provisions of a treaty or, more generally, to the way in which a State or an international organization intends to implement the treaty as a whole".

249/ See guideline 1.1, report of the International Law Commission on the work of its fiftieth session, ibid., p. 195.

exclude or to modify the legal effect of certain provisions of the treaty to which the reservation applies and not the provisions themselves. 250/

(3) A criticism of the wording relates to the use of the expression "certain provisions". It has been noted that this expression was justified "out of the very commendable desire to exclude reservations that are too general and imprecise 251/ and that end up annulling the binding character of the treaty", a consideration regarding which it might be queried whether it "should be placed in article 2. In fact, it relates to the validity of reservations. However, it is not because a statement entails impermissible consequences that it should not be considered a reservation. Moreover, practice provides numerous examples of perfectly valid reservations that do not focus on specific provisions: they exclude the application of the treaty as a whole under certain well-defined circumstances". 252/

(4) We should not confuse, on the one hand, a general reservation characterized by the lack of specificity and general nature of its content and, on the other, an across-the-board reservation concerning the way in which the State or the international organization that formulates it intends to apply the treaty as a whole, but which cannot necessarily be criticized for lack of precision, since it relates to a specific aspect of the treaty.

(5) Across-the-board reservations are a standard practice and, as such, have not raised particular objections. The same is true of reservations that exclude or limit the application of a treaty:

(a) To certain categories of persons; 253/

250/ The wording of article 21, paragraph 1, of the 1969 and 1986 Conventions is more questionable, in that it defines the legal effects of reservations as amendments to the provisions to which they refer.

251/ Cf. the observations of the Government of Israel on the first draft of the International Law Commission (Yearbook ... 1965, vol. II, p. 14) or the statement by the representative of Chile at the first session of the Vienna Conference, in 1968 (A/CONF.39/11/SR.4, para. 5).

252/ Pierre-Henri Imbert, Les réserves aux traités multilatéraux (Paris, Pédone, 1979), pp. 14-15. Similarly, see, for example, Renata Szafarz, "Reservations to Multilateral Treaties", The Polish Yearbook of International Law, 1970, p. 296.

253/ See, for example, the United Kingdom's reservation concerning the application of the International Covenant on Civil and Political Rights to members of the armed forces and prisoners (Multilateral treaties deposited

(b) Or of objects, especially vehicles; 254/

(c) Or to certain situations; 255/

(d) Or to certain territories; 256/

(e) Or in certain specific circumstances; 257/

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with the Secretary-General - status as at 31 December 1997, United Nations publication, Sales No. E.98.V.2, chap. IV.4, p. 130) or that of Guatemala concerning the application of the Customs Convention on the Temporary Importation of Private Road Vehicles of 4 June 1954 to natural persons only (ibid., chap. XI.A.8, p. 439).

254/ See, for example, Yugoslavia's reservation to the effect that the provisions of the Convention relating to the Unification of Certain Rules concerning Collisions in Inland Navigation shall not apply to vessels exclusively employed by the public authorities (ibid., chap. XII.3, p. 635) or that of Germany to the effect that the Convention on the Registration of Inland Navigation Vessels of 25 January 1965 would not apply to vessels navigating on lakes and belonging to the German Federal Railways (ibid., chap. XII.4, p. 637).

255/ See, for example, the Argentine reservations to the 1982 Convention of the International Telecommunication Union with regard to the possible increase in its contribution and the possibility that the other parties would not observe their obligations under the Convention (reply by Argentina to the Commission's questionnaire on reservations); or the reservation of France on signature of the final proceedings of the Regional Administrative Conference for the Planning of Maritime Radiobeacons in the European Maritime Area in 1985, concerning the requirements for the adequate operation of the French maritime radio-navigation service using the multi-frequency phase metering system (reply by France to the questionnaire on reservations).

256/ See draft guideline 1.1.3 in report of the International Law Commission on the work of its fiftieth session, 1998, Official Records of the General Assembly, Fifty-third Session, Supplement No. 10 (A/53/10), p. 206.

257/ See France's reservation to the General Act of Arbitration of 26 September 1928 to the effect that "in future [the said accession to the Act] shall not extend to disputes relating to any events that may occur in the course of a war in which the French Government is involved" (ibid., p. 1006). (Similar reservations were made by the United Kingdom and New Zealand.) See also the reservations of the majority of States parties to the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, whereby that instrument would cease to be binding for the Government of the State making a reservation with regard to any enemy State whose armed forces or whose allies did not respect the prohibitions which were the object of the Protocol. Status of Multilateral Arms Regulation and Disarmament Agreements, 4th ed., 1992, vol. I, pp. 11-21.

(f) Or for special reasons relating to the international status of their author; 258/

(g) Or to the author's national laws; 259/

etc.

(6) Some of these reservations have given rise to objections on grounds of their general nature and lack of precision 260/ and it may be that some of them are tainted by impermissibility for one of the reasons specified in article 19 of the 1969 and 1986 Vienna Conventions. But this impermissibility stems from the legal regime of the reservations and is a separate problem from that of their definition. Furthermore, the inclusion of across-the-board reservations in the category of reservations constitutes an indispensable prerequisite to assessing their validity under the rules relating to the legal

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258/ See, for example, Austria's and Switzerland's reservations to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction of 10 April 1972, with regard to preserving their status of neutrality (Swiss reply to the questionnaire on reservations) (United Nations, Treaty Series, vol. 1015, p. 236) or Austria's similar reservation to the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 10 December 1976 (Multilateral Treaties ..., chap. XXVI.1, p. 878).

259/ See, for example, the reservations of the United States, Italy and Japan to the effect that those countries would apply the International Wheat Agreement of 14 March 1986 provisionally within the limitations of internal legislation (ibid., chap. XIX.28, p. 744) or the reservation of Canada to the Convention on the Political Rights of Women of 31 March 1953 "in respect of rights within the legislative jurisdiction of the provinces" (ibid., chap. XVI.1, p. 682).

260/ See, for example, the objections of numerous countries to the reservations made by the Maldives to the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 concerning the Islamic Shariah (ibid., chap. IV.8, pp. 179-184) and also the reservations made by Egypt to the same Convention. See, in this respect, the articles by Anna Jenefsky, "Permissibility of Egypt's Reservations to the Convention on the Elimination of All Forms of Discrimination against Women", Maryland Journal of International Law and Trade, vol. 15, 1991, pp. 199-233, and by R. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination against Women", Virginia Journal of International Law, vol. 30, 1990, pp. 643-716. See also the objections of certain countries to the reservation of the United States of America to the Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948, relating to the Constitution of the United States (ibid., chap. IV.1, pp. 89-91).

regime governing reservations; an impermissible reservation (a) is still a reservation and (b) cannot be declared impermissible unless it is a reservation.

(7) Another element that supports a non-literal interpretation of the Vienna definition relates to the fact that some treaties prohibit across-the-board reservations or certain categories of such reservations, in particular general reservations. 261/ Such a clause would be superfluous (and inexplicable) if unilateral statements designed to modify the legal effect of a treaty as a whole, at least with respect to certain specific aspects, did not constitute reservations.

(8) The abundance and coherence of the practice of across-the-board reservations (which are not always imprecise and general reservations) and the absence of objections in principle to this type of reservations indicate a practical need that it would be absurd to challenge in the name of abstract legal logic. Moreover, the interpretation of rules of law should not be static; article 31, paragraph 3, of the Vienna Convention invites the interpreter of treaty rules to take into account, "together with the context: ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", and, as the International Court of Justice has underlined, a legal principle should be interpreted in the light of "the subsequent development of international law". 262/

(9) In order to remove any ambiguity and avoid any controversy, it consequently appears reasonable and useful to establish, in the Guide to Practice, the broad interpretation that States actually give to the apparently restrictive formula of the Vienna definition with regard to the expected effect of reservations.

261/ This is so in the case of article 64, paragraph 1, of the European Convention on Human Rights or article XIX of the Inter-American Convention on Forced Disappearance of Persons.

262/ Advisory Opinion of 21 June 1971, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971, p. 16, para. 53.

(10) However, after completing the consideration of the draft guidelines on interpretative declarations and other unilateral declarations which States and international organizations formulate in respect of treaties or on the occasion of their conclusion, the Commission made a number of changes to draft guideline 1.1.1 [1.1.4] which it had initially adopted. 263/

(11) Firstly, it seems that, owing to its general nature, the initial wording could lead to an absurd result by suggesting, without further explanation, that a reservation might relate to the treaty as a whole; that might even empty it of all substance. The addition of the words "of specific aspects" before the words "of the treaty as a whole" is designed to avoid that interpretation, which also would have been illogical.

(12) Secondly, in order to dispel the concern expressed by a number of members of the Commission and avoid any confusion with declarations relating to the implementation of a treaty at the internal level, which is the subject of draft guideline 1.4.5 [1.2.6], or even with general statements of policy, defined in draft guideline 1.4.4 [1.2.5], the Commission decided not to include any reference in draft guideline 1.1.1 [1.1.4] to "the way in which the State or international organization intends to implement the treaty as a whole". It confined itself to using the actual text of the Vienna definition, according to which, when it formulates a reservation, a State or international organization "purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization", specifying, however, that the same may also apply if the reservation relates to certain aspects of the treaty as a whole. In the view of the Commission, another advantage of this wording is that it highlights the objective pursued by the author of the reservation, which is at the heart of the definition of reservations adopted in the 1969 and 1986 Vienna Conventions

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263/ The commentary to this draft guideline was published in the report of the International Law Commission on the work of its fiftieth session, 1998, Official Records of the General Assembly, Fifty-third Session, Supplement No. 10 (A/53/10), pp. 196-199.

and on which the draft guidelines relating to the definition of interpretative declarations and other unilateral declarations formulated with regard to a treaty 264/ are also based.

(13) Thanks to this approach, the new wording of draft guideline 1.1.1 [1.1.4] no longer uses the verb "may" ("a reservation may relate ..."), which might have suggested that, by definition, the across-the-board reservations covered by this provision were permissible. In fact, it goes without saying that such definitional precision in no way prejudges the permissibility (or impermissibility) of reservations: whether they relate to certain provisions of the treaty or to certain aspects of the treaty as a whole, they are subject to the substantive rules relating to the validity (or permissibility) of reservations. This clearly stems, moreover, from the inclusion of the draft in the first part of the Guide to Practice dealing exclusively with questions of definition and is expressly confirmed by draft guideline 1.6, reproduced below.

(14) Some members of the Commission pointed out, not without justification, that reservations could relate only to certain particular aspects of specific provisions, and that, in their view, is a third hypothesis to be added to reservations purporting "to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization", a hypothesis directly covered by draft guideline 1.1, and those purporting "to exclude or modify the legal effect of specific aspects of the treaty as a whole", i.e. the across-the-board reservations which are the subject of the present draft guideline. In the Commission's view, it is unquestionable that the authors of reservations frequently purport to exclude or modify the legal effect of certain provisions of a treaty only with respect to certain specific aspects, 265/ but this

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264/ See draft guidelines 1.2, 1.2.1 [1.2.4], 1.3, 1.3.1 and 1.4.1 [1.1.5] to 1.4.5 [1.2.6] below.

265/ See, among very numerous examples: the reservations of Canada, the United States, Laos, Thailand and Turkey to the Convention on the Privileges and Immunities of the United Nations (Multilateral treaties deposited with the Secretary-General - status as at 31 December 1997, chap. III.I, pp. 38-39), that of Malta to the 1954 Additional Protocol to the Convention concerning Customs Facilities for Touring (ibid., chap. XI.A.7, p. 436) and that of the European Community to articles 6 and 7 of the 1994 Convention on Customs Treatment of Pool Containers (ibid., chap. XI.A.18, possibility is covered by the general definition of draft guideline 1.1 and, more specifically, by the word "modify", which necessarily implies that the reservation relates only to certain aspects of the provisions in question.

1.1.5 [1.1.6] Statements purporting to limit the obligations of their author

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.

Commentary

(1) There is no doubt that the expression "to modify the legal effect of certain provisions of the treaty", as contained in the "Vienna definition" used in draft guideline 1.1, refers to reservations which limit or restrict this effect and, at the same time, to the reserving State's obligations under the treaty "because 'restricting' is a way of 'modifying'". 266/ Moreover, nearly all reservations are intended to limit the obligations which are in principle incumbent on the declarant under the treaty.

(2) This is in all probability why the amendments proposed during the Vienna Conference on the Law of Treaties for the addition of the words "limit" and "restrict" to the list of the legal effects intended by reservations 267/ were not adopted: they would not have added anything to the final text. 268/

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p. 461).

266/ Frank Horn, Reservations and Interpretative Declarations to Multilateral Treaties, T.M.C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, vol. 5, 1988, p. 80.

267/ See the amendments proposed by Sweden (add [a comma and] the word "limit" after the word "exclude") and Viet Nam (add a comma and the words "to restrict" after the word "exclude") (Report of the Committee of the Whole on its work at the first session of the Conference, para. 35; A/CONF.39/14, United Nations Conference on the Law of Treaties, first and second sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969), Official Records, Documents of the Conference, United Nations, New York, 1971, Sales No. E.70.V.5, p. 112).

268/ See Frank Horn, op. cit. (note 266 above), p. 80.

(3) The Commission nevertheless considers that the preparation of a Guide to Practice does not impose the same constraints as the drafting of a convention: such a guide can contain a statement of the obvious that would not belong in a treaty.

(4) However, draft guideline 1.1.5 [1.1.6] also serves a more basic purpose. In the Commission's view, its inclusion in the Guide to Practice, together with draft guidelines 1.1.6, 1.4.1 [1.1.5] and 1.4.2 [1.1.6], helps to shed light on a question that arises constantly in connection with reservations to treaties, i.e. whether there is any such thing as "extensive reservations", of which there is no generally accepted definition, 269/ as may be noted from the outset.

(5) The Commission does not intend to enter into a purely theoretical debate, which would be out of place in a Guide to Practice, and it has refrained from using that ambiguous term, but it notes that, when a State or an international organization formulates a unilateral statement by which it intends to limit the obligations the treaty would impose on it in the absence of such a statement, its intention at the same time is inevitably to increase its own rights at the expense of those that the other contracting parties would have under the treaty if the treaty was applied in its entirety; in other words, the obligations of the reserving State's partners are increased accordingly. To this extent, "limitative" reservations, i.e. the majority of reservations, may appear to be "extensive reservations".

269/ For example, Ruda defines "extensive reservations" as "declarations or statements purporting to enlarge the obligations included in the treaty" and he includes "unilateral declarations whereby the State assumes obligations, without receiving anything in exchange, because the negotiations for the adoption of the treaty have already been closed" ("Reservations to Treaties", Recueil des cours ... 1975-III, vol. 146, p. 107); Horn makes a distinction between "commissive declarations", by which the State making the declaration undertakes more than the treaty requires, and "extensive reservations proper", whereby "a State will strive to impose wider obligations on the other parties, assuming correspondingly wider rights for itself" (Reservations and Interpretative Declarations to Multilateral Treaties, op. cit. (note 266 above), p. 90); Mr. Imbert considers that "there are no 'extensive reservations'" (Les réserves aux traités multilatéraux, Paris, Pédone, 1979, p. 15); see also the discussion between two members of the Commission, Mr. Bowett and Mr. Tomuschat, in 1995 (A/CN.4/SR.2401, pp. 4 and 7).

(6) A distinction should, however, be made between two types of statement which are related only in appearance:

Statements which, because they are designed to exempt their author from certain obligations under the treaty, restrict, by correlation, the rights of the other contracting parties; and

Statements designed to impose new obligations, not provided for by the treaty, on the other parties to it.

(7) Draft guideline 1.1.5 [1.1.6] relates only to statements in the first of these categories; those in the second are the subject of draft guideline 1.4.2 [1.1.6] and are not reservations within the meaning of the present Guide to Practice.

(8) Certain reservations by which a State or an international organization intends to limit its obligations under the treaty have sometimes been presented as "extensive reservations". This is, for example, the case of the statement by which the German Democratic Republic indicated its intention to bear its share of the expenses of the Committee against Torture only so far as they arose from activities within its competence as recognized by the German Democratic Republic. 270/ It was questioned whether such a reservation was permissible, 271/ but it is not because it would have the consequence of increasing the financial burden on the other parties that it should not be described as a reservation or that it would, by its nature, differ from the usual "modifying" reservations.

(9) This seems to apply too in the case of another example of reservations described as "extensive" on the ground that "the reserving State simply widens its rights (and not its obligations), increasing by the same token the obligations of its partners": 272/ the reservations formulated by Poland and several socialist countries to article 9 of the Geneva Convention on the High Seas, under which "the rule expressed in article 9 [relating to the immunity of State vessels] applies to all ships owned or operated by a

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270/ See Multilateral Treaties ..., chap. IV.9, note 5, p. 200.

271/ Cf. Richard W. Edwards, Jr., "Reservations to Treaties", Michigan Journal of International Law, 1989, pp. 392-393.

272/ Renata Szafarz, "Reservations to Multilateral Treaties", Polish Y.B.I.L., 1970, pp. 295-296.

State" 273/ would constitute "extensive reservations" because the reserving State simply widens its rights (and not its obligations), increasing by the same token the obligations of its partners. Once again, there is in fact nothing special about this: such a reservation "operates" like any limitative reservation; the State which formulates it modulates the rule laid down in the treaty so as to limit its treaty obligations. 274/

(10) The fact is that the reserving State must not take the opportunity offered by the treaty to try, by means of a reservation, to acquire more rights than those to which it could claim to be entitled under general international law. In such a case, a unilateral statement formulated by a State or an international organization comes not within the category of reservations, as provided for in the draft guideline under consideration, but under that of unilateral statements purporting to add further elements to a treaty, which do not constitute reservations and are the subject of draft guideline 1.4.2 [1.1.6]. 275/

273/ Multilateral Treaties ..., chap. XXI.2, p. 789.

274/ The examples of "limitative reservations" of this kind are extremely numerous, since, in this case, the modulation of the effect of the treaty may be the result (i) of the substitution by the reserving State of provisions of its internal law for provisions contained in the treaty: "The Argentine Government states that the application of article 15, paragraph 2, of the International Covenant on Civil and Political Rights shall be subject to the principle laid down in article 18 of the Argentine Consitution" ("interpretative declaration" by Argentina concerning the International Covenant on Civil and Political Rights, Multilateral Treaties ..., chap. IV.4, p. 122); (ii) the substitution of obligations stemming from other international instruments for provisions of the treaty to which the reservation is attached: "Articles 19, 21 and 22 in conjunction with article 2, paragraph 1, of the Covenant shall be applied within the scope of article 16 of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms" (reservation No. 1 by Germany to the same Covenant, ibid., p. 125); (iii) of a different formulation, devised for the occasion by the reserving State, regardless of any pre-existing rule: "Article 14 (3) (d) of the Covenant shall be applied in such manner that it is for the court to decide whether an accused person held in custody has to appear in person at the hearing" (reservation No. 2 by Germany, idem).

275/ It may actually be difficult to tell the difference between the two, since everything depends on whether the State or the international organization intends, by its statement, to grant itself more rights than it has under general international law, and that depends on the interpretation both of the statement itself and of the customary rule to which the declarant is referring. Thus, in the example of the Polish statement given in

(11) According to the definition of reservations itself, reservations cannot be described as such unless they are made "when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or [by a State] when making a notification of succession to a treaty". 276/ To the extent that unilateral statements purporting to limit the obligations of the State or the international organization formulating them are reservations, this temporal element (which, as the Commission has already stressed, was justified by practical, not logical, considerations 277/), comes into play and they are obviously subject to this temporal limitation.

(12) Taking this reasoning to its logical conclusion would probably also mean reproducing the entire list of cases in which a reservation may be formulated, as contained in draft guideline 1.1. However, the Commission considered that this would make the wording unnecessarily cumbersome and that a general reminder would be enough; this is the purpose of the expression "when that State expresses its consent to be bound". 278/

1.1.6 Statements purporting to discharge an obligation by equivalent means

A unilateral statement formulated by a State or an international organization when that State or that organization expresses its consent to be bound by a treaty by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from but equivalent to that imposed by the treaty constitutes a reservation.

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paragraph (9) above, it must be regarded as a reservation if it is considered that there is a customary rule by virtue of which all State vessels, lato sensu, benefit from immunity; otherwise, it must be regarded as a statement purporting to add further elements to the treaty, within the meaning of draft guideline 1.4.2 [1.1.6] (a position on this matter does not have to be adopted for the purposes of the present Guide to Practice).

276/ See draft guideline 1.1.

277/ See the commentary to draft guideline 1.1.2, paras. 2 and 3, in Report of the International Law Commission on the work of its fiftieth session, 1998, Official Records of the General Assembly, Fifty-third Session, Supplement No. 10 (A/53/10), p. 204.

278/ This expression also refers back implicitly to draft guideline 1.1.2.

Commentary

(1) The rather specific case dealt with in draft guideline 1.1.6 may be illustrated by the Japanese reservation to the Food Aid Convention, 1971. Under Article II of that treaty, the parties agreed to contribute as food aid to the developing countries wheat and other grains in the annual amounts specified. In the statement it made when signing, Japan reserved:

> "the right to discharge its obligations under Article II by providing assistance in the form of rice, not excluding rice produced in non-member developing countries, or, if requested by recipient countries, in the form of agricultural materials". 279/

(2) Such a statement does purport to modify the legal effect of some provisions of the treaty in their application to its author 280/ and it therefore comes within the framework of the definition of reservations.

(3) It is probably hardly likely that it would take effect without the acceptance of the other parties (at least the recipients of the assistance, in the case of the Japanese reservation), but this is the case of reservations resulting from article 20 of the 1969 and 1986 Vienna Conventions.

(4) The originality of the reservations referred to in this draft guideline lies in the expression "in a manner different from but equivalent to". If the obligation assumed is less than that provided for by the treaty, the case is one covered by draft guideline 1.1.5 [1.1.6] (reservations purporting to limit the obligations of their author); if it is heavier, it is a statement purporting to undertake unilateral commitments, which are not reservations according to draft guideline 1.4.1 [1.1.5]. In accordance with the general principles of public international law, this equivalence can be assessed only by each contracting party insofar as it is concerned; where assessments differ, the parties must resort to a means of peaceful settlement.

(5) The temporal element is, of course, essential in this case: if the "substitution" takes place after the entry into force of the treaty for its

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279/ United Nations Treaty Series, vol. 800, p. 197.

280/ On the understanding that, in the above-mentioned example, things are slightly less clear because Article II does not strictly limit the grains to be supplied to wheat, but, for the sake of argument, it may be assumed that it does.

author, it will at best be a collateral agreement (if the other contracting parties accept it) and, at worst, a violation of the treaty. However, this is true for all unilateral statements formulated "late".

1.2 [1.2] Definition of interpretative declarations

"Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.

Commentary

(1) Notwithstanding the apparent silence of the 1969 and 1986 Vienna Conventions on this phenomenon, States have always felt that they could attach to their expression of consent to be bound by multilateral treaty declarations whereby they indicate the spirit in which they agree to be bound; these declarations do not, however, seek to modify or exclude the legal effect of certain provisions of the treaty and thus do not constitute reservations, but interpretative declarations. 281/

(2) It is often difficult to distinguish between such unilateral declarations and, on the one hand, reservations as defined in draft guideline 1.1 282/ and, on the other hand, other types of unilateral declarations which are made in respect of a treaty, often on the occasion of the expression of consent by its authors to be bound, but which are neither

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281/ The long-standing practice of such declarations had been in existence since multilateral treaties themselves first appeared. Generally speaking, it dates back to the Final Act of the Congress of Vienna in 1815, which brought together "in a general instrument" all treaties concluded in the wake of Napoleon's defeat. With this initial appearance of the multilateral format came both a reservation and an interpretative declaration. The latter came from Great Britain, which, when the instruments of ratification were exchanged, declared that article VIII of the Treaty of Alliance concluded with Austria, Prussia and Russia, which invited France to join the Alliance, must be "understood as binding the Contracting Parties ... to a common effort against the power of Napoleon Bonaparte ..., but is not to be understood as binding His Britannic Majesty to prosecute the War, with a view of imposing upon France any particular Government". Today, interpretative declarations are very frequent, as shown by the replies of States and, to a lesser extent, of international organizations to the Commission's questionnaire on reservations.

282/ See the Report of the International Law Commission on the work of its fiftieth session, 1998, Official Records of the General Assembly, Fifty-third Session, Supplement No. 10 (A/53/10), p. 196.

reservations nor interpretative declarations and the main points of which are listed in section 1.4 of the present Guide to Practice. This distinction is of great practical importance, however, because it affects the legal regime applicable to each of these declarations.

(3) For a long time, reservations and interpretative declarations were not clearly distinguished in State practice or in doctrine. In the latter case, the dominant view simply grouped them together and authors who made a distinction generally found themselves embarrassed by it. 283/

(4) A number of elements help to blur the necessary distinction between reservations and interpretative declarations:

The terminology is hesitant;

The practice of States and international organizations is uncertain; and

The declarants' objectives are not always unambiguous.

(5) The terminological uncertainty is underscored by the definition of reservations itself, since, according to the 1969, 1978 and 1986 Vienna Conventions, a reservation is "a unilateral statement, however phrased or named ...". 284/ This "negative precision" eschews any nominalism to focus attention on the actual content of declarations and on the effect they seek to produce, but - and here is the reverse side of the coin - this decision to give precedence to substance over form runs the risk, in the best of cases, of encouraging States not to pay attention to the name they give to their declarations, thereby sowing confusion or unfortunate ambiguity; in the worst cases, it allows them to play with names to create uncertainty as to the real nature of their intentions. 285/ By giving the name of "declarations" to

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283/ See the survey of doctrine prior to 1969 made by F. Horn, Reservations and Interpretative Declarations to Multilateral Treaties, op. cit. (note 266 above), p. 229; see also D.M. McRae, "The Legal Effect of Interpretative Declarations", B.Y.B.I.L. 1978, p. 156; Rosario Sapienza, Dichiarazioni interpretative unilaterali e trattati internazionali, Milan, Giuffrè, 1996, pp. 69-82 (prior to the Second World War) and pp. 117-122 (post-1945); or Sir Ian Sinclair, The Vienna Convention on the Law of Treaties, Manchester U.P., 1984, pp. 52-53.

284/ Article 2, paragraph 1 (d), of the 1969 Convention and article 2, paragraph 1 (j), of the 1986 Convention.

285/ As Denmark points out in its reply to the Commission's questionnaire on reservations: "There even seems to be a tendency among States to cast their reservations in terms of interpretative statements either instruments that are obviously and unquestionably real reservations, they hope not to arouse the vigilance of the other States parties while attaining the same objectives; conversely, to give greater weight to declarations that clearly have no legal effect on the provisions of a treaty, they label them "reservations", even though under the terms of the Vienna definition they are not.

(6) Instruments having the same objective can be called "reservations" by one State party and "interpretative declarations" by another. 286/ Sometimes, instruments having the same objective can be called "reservations" by some States, "interpretations" by others and nothing at all by still others. 287/ In some cases, a State will employ various expressions that make it difficult to tell whether they are being used to formulate reservations or interpretative declarations and whether they have different meanings or scope. 288/ Thus, the same words can, in the view of the very State employing

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because the treaty does not allow for reservations proper or because it looks 'nicer' with an interpretative declaration than a real reservation".

286/ For example, France and Monaco have used identical terms to spell out the way in which they interpret article 4 of the 1966 Convention on the Elimination of All Forms of Racial Discrimination, yet Monaco submitted this interpretation as a reservation, while France formally announced that its intention was merely to "place on record its interpretation" of that provision (Multilateral Treaties ..., chap. IV.2, pp. 104, 106 and 115, note 15). Poland and Syria have also declared in the same terms that they do not consider themselves bound by the provisions of article 1, paragraph 1, of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, but the former expressly called this statement a "reservation", while the latter labelled it a "declaration" (ibid., chap. XVIII.7, p. 765).

287/ See in this connection the comments by F. Horn (Reservations and Interpetative Declarations to Multilateral Treaties, op. cit. (note 266 above) p. 294) on the subject of declarations made in respect of the 1966 International Covenant on Civil and Political Rights.

288/ That was the case of France, for example, when it acceded to the International Covenant on Civil and Political Rights:

> "The Government of the Republic considers that ...";
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> "The Government of the Republic enters a reservation concerning ...";
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> "The Government of the Republic declares that ...";
>
> "The Government of the Republic interprets ...";

with all of these formulas appearing under the heading "Declarations and reservations" (example given by Rosario Sapienza, Dichiarazioni interpretative unilaterali e trattati internazionali, op. cit. (note 283 above), pp. 154-155; complete text in *Multilateral Treaties deposited with the Secretary-General - Status as at 31 December 1997*, chap. IV.4, p. 124.

them, cover a range of legal realities. 289/ It sometimes happens that, faced with an instrument entitled "declaration", the other parties to the treaty view it in different ways and treat it either as such or as a "reservation" or, conversely, that objections to a "reservation" refer to it as a "declaration"; 290/ and, at the limit of this terminological confusion, there are even occasions when States make interpretative declarations by means of a specific reference to the provisions of a convention on reservations. 291/

(7) The confusion is worsened by the fact that, while in French one encounters few terms other than "*réserves*" and "*déclarations*", 292/ English

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289/ In accepting the IMCO Statute, Cambodia twice used the word "declares" to explain the scope of its acceptance. In response to a request for clarification from the United Kingdom, Norway and Greece, Cambodia explained that the first part of its declaration was "a political declaration" but that the second part was a reservation (ibid., chap. XII.1, p. 612 and p. 631, note 10).

290/ For example, while several of the "Eastern bloc" countries identified their statements of opposition to article 11 of the Vienna Convention on Diplomatic Relations (which deals with size of missions) as "reservations", the countries that objected to those statements sometimes called them "reservations" (Germany and the United Republic of Tanzania) and sometimes "declarations" (Australia, Belgium, Canada, Denmark, France, the Netherlands, New Zealand, Thailand and the United Kingdom) (ibid., chap. III.3, pp. 56-63).

291/ Such was the case of a "declaration" made by Malta with regard to article 10 of the European Convention on Human Rights which referred to article 42 of that instrument (example cited by William Schabas, commentary on article 64 in Louis-Edmond Pettiti, Emmanuel Decaux and Pierre-Henri Imberg (dirs.), *La Convention européenne des Droits de l'homme - Commentaire article par article* (Paris, Économica, 1995), p. 926).

292/ This would seem to hold true in general for all the romance languages: in Spanish, the distinction is made between "*reserva*" and "*declaración* (*interpretativa*)", in Italian between "*riserva*" and "*dichiarazione* (*interpretativa*)", in Portuguese between "*reserva*" and "*declaracão* (*interpretativa*)" and in Romanian between "*rezervă*" and "*declaratie* (*interpretativ*)". The same holds true for Arabic, German and Greek.

terminology is much more varied, since certain English-speaking States, particularly the United States of America, use not only "reservation" and "(interpretative) declaration", but also "statement", "understanding", "proviso", "interpretation", "explanation" and so forth. The advantage of this variety of terms, although not based on strict distinctions, 293/ is that it shows that all unilateral declarations formulated in respect or on the occasion of a treaty are not necessarily either reservations or interpretative declarations; draft guidelines at 1.4 to 1.4.5 [1.2.6] describe these other types of unilateral declarations, which, in the view of the Commission, should be excluded from the scope of this Guide to Practice because, prima facie, they do not come under the law of treaties.

(8) It goes without saying that the elements listed above are not in themselves likely to facilitate the search for an independent criterion for distinguishing between reservations and interpretative declarations. It should be possible to seek it empirically, however, by starting, as one

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293/ Marjorie M. Whiteman describes United States practice this way: "The term 'understanding' is often used to designate a statement when it is not intended to modify or limit any of the provisions of the treaty in its international operation but is intended merely to clarify or explain or to deal with some matter incidental to the operation of the treaty in a manner other than a substantive reservation ... The terms 'declaration' and 'statement' are used most often when it is considered essential or desirable to give matters of policy or principle, without an intention of derogating from the substantive rights or obligations stipulated in the treaty." (Digest of International Law (Washington, D.C., 1970), vol. 14, pp. 137-138); see also the letter dated 27 May 1980 from Mr. Arthur W. Rovine, Assistant Legal Adviser for Treaties in the United States Department of State, to Mr. Ronald F. Stowe, Chairman of the Air and Space Law Committee of the International Law Section of the American Bar Association, reproduced in Marian Nash Leich, ed., Digest of United States Practice in International Law (Washington, D.C., Office of the Legal Adviser, Department of State, 1980), pp. 397-398. These various names can have a legal impact on some domestic legislation; they seem not to in the area of international law, and it is not certain that the distinctions are categorical, even at the internal level. Thus during the debate in the United States Senate on the Convention relating to the Organization for Economic Cooperation and Development (OECD), when the Chairman of the Foreign Affairs Committee asked what the difference between a "declaration" and an "understanding" was, the Under-Secretary of State for Economic Affairs replied: "Actually the difference between a declaration and an understanding, I think, is very subtle, and I am not sure that it amounts to anything" (quoted by Marjorie M. Whiteman, op. cit., p. 192). As the Special Rapporteur understands it, in Chinese, Russian and the Slavic languages in general, it is possible to draw distinctions between several types of "interpretative" declarations.

generally does, 294/ with the definition of reservations in order to extract, by means of comparison, the definition of interpretative declarations. At the same time, this also makes it possible to distinguish both interpretative declarations and reservations from other unilateral declarations that fall into neither of these categories.

(9) That was the position of Sir Gerald Fitzmaurice, third Special Rapporteur on the Law of Treaties, who, in his first report in 1956, defined interpretative declarations negatively in contrast with reservations, stating that the term "reservation"

> "does not include mere statements as to how the State concerned proposes to implement the treaty, or declarations of understanding or interpretation, unless these imply a variation on the substantive terms or effect of the treaty". 295/

However, that was a "negative", "hollow" definition, which clearly showed that reservations and interpretative declarations were distinct legal instruments, but did not positively define what was meant by "interpretative declaration". Furthermore, the formulation eventually used, which, it may be assumed, probably related to the "conditional interpretative declarations" defined in draft guideline 1.2.1 [1.2.4] below, was lacking in precision, to say the least.

(10) This second shortcoming was corrected in part by Sir Humphrey Waldock, who, in his first report, submitted in 1962, removed some of the ambiguity brought about by the end of the definition proposed by his predecessor, but once again proposed a purely negative definition:

> "an explanatory statement or statement of intention or of understanding as to the meaning of the treaty, which does not amount to a variation in the legal effect of the treaty, does not constitute a reservation". 296/

(11) In the view of the Commission, this procedure makes it possible to know what an interpretative declaration is not; it is of little use in defining

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294/ Cf. Rosario Sapienza, Dichiarazioni interpretative unilaterali e trattati internazionali, op. cit. (note 283 above), p. 142 or Frank Horn, Reservations and Interpretative Declarations to Multilateral Treaties, op. cit. (note 266 above), p. 236.

295/ Document A/CN.4/101; Yearbook ... 1956, vol. II, p. 112.

296/ Document A/CN.4/144; Yearbook ... 1962, vol. II, p. 36.

what it is, a question in which the International Law Commission lost interest during the drafting of the Vienna Convention. 297/ Yet it is important to determine "positively" whether or not a unilateral declaration made in respect of a treaty constitutes an interpretative declaration because, firstly, it gives rise to specific legal consequences which the Commission will set out to describe in part IV of the Guide to Practice and, secondly, these consequences come under the law of treaties, unlike other categories of unilateral declarations, which are defined below in section 1.4.

(12) An empirical observation of practice helps to determine in a reasonably precise manner how interpretative declarations are similar to reservations and how they differ and to arrive at a positive definition of the former.

(13) There seems to be no point in dwelling on the fact that an interpretative declaration is most certainly a unilateral declaration 298/ in the same way as a reservation. 299/ It is in fact this point in common which

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297/ However, the commentary to draft article 2, paragraph 1 (d), points out that the declaration which is a mere "clarification of the State's position" ... does not "amount to a reservation" (ILC, Yearbook ... 1966, vol. II, p. 206). Moreover, in its comments on the draft articles on the law of treaties adopted on first reading, Japan attempted to bridge that gap by noting "that not infrequently a difficulty arises in practice of determining whether a statement is in the nature of a reservation or of an interpretative declaration" and by suggesting that "a new provision should be inserted [...] in order to overcome this difficulty" (Sir Humphrey Waldock, fourth report on the law of treaties, ILC, Yearbook ... 1964, vol. II, pp. 46-47). However, the Japanese position confined itself to making provision for the insertion of a paragraph to draft article 18 (which becomes article 19): "2. A reservation, in order to qualify as such under the provisions of the present articles, must be formulated in writing, and expressly stated as a reservation" (comments transmitted by a note verbale of 4 February 1964, A/CN.4/175, p. 78; cf. also pp. 70-71); here again, this was not a "positive" definition of interpretative declarations, and the insertion proposed was more a matter for the legal regime of reservations than their definition. Moreover, this proposal is incompatible with the definition of reservations eventually retained, which consists in removing all nominalism.

298/ On the possibility of jointly formulating interpretive declarations, see draft guideline 1.2.2 [1.2.1] and the commentary thereto.

299/ Cf. Frank Horn, Reservations and Interpretative Declarations to Multilateral Treaties, op. cit. (note 266 above), p. 236.

is at the origin of the entire difficulty of drawing a distinction: they look the same; in form, virtually nothing 300/ distinguishes them.

(14) The second point in common between reservations and interpretative declarations has to do with the irrelevance of the phrasing or name chosen by their author.301/ This element, which automatically stems, a fortiori, from the very definition of reservations,302/ is confirmed by the practice of States and international organizations, which, faced with unilateral declarations submitted as interpretative declarations by their authors, do not hesitate to object to them by expressly considering them to be reservations.303/ Similarly, nearly all the writers who have recently looked

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300/ The question in fact arises whether, unlike reservations, interpretative declarations can be formulated orally; as the definition of reservations does not expressly mention their written form, the Commission considers it preferable, for the sake of symmetry, to refrain at this stage from proposing a guideline for the Guide to Practice along those lines. It reserves the right to do so in the following chapter of the Guide to Practice relating to the formulation of reservations and interpretative declarations.

301/ According to one member of the Commission, the expression "phrasing or name" is inappropriate and should be replaced by "title or designation [or formulation]"; while not being insensitive to that proposal, the Commission nevertheless considered that it would be preferable to confine itself to the terminology used in the Vienna Conventions on the Law of Treaties; see also the commentary to draft guideline 1.3.2 [1.2.2], paragraph (12).

302/ See draft guideline 1.1 in Report of the International Law Commission on the work of its fiftieth session, op. cit. (supra, footnote 248), p. 196.

303/ There are countless examples of this phenomenon. To mention only a few that relate to recent conventions, there are:

> The objection of the Netherlands to Algeria's interpretative declaration concerning paragraphs 3 and 4 of article 13 of the International Covenant on Economic, Social and Cultural Rights (Multilateral Treaties ..., chap. IV.3, p. 117).
>
> The reactions of many States to the declaration by the Philippines in respect of the 1982 Montego Bay Convention (ibid., chap. XXI.6, pp. 824-826).
>
> The objection of Mexico, which considered that the third declaration, formally called interpretative, of the United States of America to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 constituted "a modification of the Convention contrary to the objective of the latter"

into this fine distinction between reservations and interpretative declarations give numerous examples of unilateral declarations which are presented as interpretative declarations by the States formulating them, but which they themselves regard as reservations, and vice versa. 304/

(ibid., chap. VI.19, p. 314).

The reaction of Germany to a declaration by which the Tunisian Government indicated that it would not adopt, in implementation of the Convention on the Rights of the Child of 20 November 1989, "any legislative or statutory decision that conflicts with the Tunisian Constitution" (ibid., chap. IV.11, p. 221). It also happens that "reacting" States contemplate both solutions and express their reactions in accordance with whether the text is a reservation or an interpretative declaration, again regardless of the term used by the author to designate it. Germany, the United Kingdom and the United States of America reacted to an interpretative declaration by Yugoslavia concerning the 1971 Seabed Treaty by considering it first as an actual interpretative declaration (which they rejected) and then as a reservation (which they considered to be late and inconsistent with the object and purpose of the Treaty) (example cited by Luigi Migliorino, "Declarations and Reservations to the 1971 Seabed Treaty", *I.Y.B.I.L.* 1985, p. 110. In the same spirit, Germany and the Netherlands objected to declarations made by the countries of Eastern Europe with regard to "the definition of piracy as given in the Convention insofar as the said declarations are to be qualified as reservations" (*Multilateral Treaties ...*, chap. XXI.2, pp. 790 and 791). Likewise, several States questioned the real nature of the (late) "declarations" by Egypt concerning the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (see in particular the reaction of Finland: "Without taking any stand on the content of the declarations, which appear to be reservations in nature ...", ibid., chap. XXVII.3, p. 931); see also paragraph (6) supra.

Judges and arbitrators also do not hesitate to question the true nature of unilateral declarations formulated by a State in respect of a treaty and, as appropriate, to call it something else; see the examples given below in the commentary to draft guideline 1.3.2 [1.2.2].

304/ For example, Derek Bowett, "Reservations to Non-Restricted Multilateral Treaties", *B.Y.B.I.L.* 1976-1977, p. 68; Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, op. cit. (note 266 above), pp. 278-324; D.M. McRae, "The Legal Effect of Interpretative Declarations", *B.Y.B.I.L.* 1978, p. 162, footnote 1; Luigi Migliorino, "Declarations and Reservations to the 1971 Seabed Treaty", *I.Y.B.I.L.* 1985, pp. 106-123, or Rosario Sapienza, *Dichiarazioni interpretative unilaterali e trattati internazionali*, op. cit., (note 283 above), pp. 154-176.

(15) It follows that, like reservations, interpretative declarations are unilateral statements formulated by a State or an international organization, it being unnecessary to be concerned about how they are phrased or named by the declarant. 305/ The two instruments are, however, very different in terms of the objective pursued by the declarant.

(16) According to the definition of reservations, they aim "to exclude or to modify the legal effect of certain provisions of the treaty in their application" to their author 306/ or to certain specific aspects of the treaty as a whole. 307/ As their name indicates, interpretative declarations have a different objective: they are aimed at interpreting the treaty as a whole or certain of its provisions.

(17) This can - and must - constitute the central element of their definition, yet it poses difficult problems nonetheless, the first of which is determining what is meant by "interpretation", a highly complex concept, the elucidation of which would far exceed the scope of the present draft. 308/

305/ This does not mean that the phrasing or name chosen has no impact whatsoever on the distinction. As may be seen from draft guideline 1.3.2 [1.2.2], they may indicate the purported legal effect.

306/ Draft guideline 1.1.

307/ Draft guideline 1.1.1 [1.1.4].

308/ Regarding the concept of interpretation, see in particular the reports by Hersch Lauterpacht at the Institute of International Law, "De l'interprétation des traités", IIL Yearbook 1950, pp. 366-423, and 1952, vol. I, pp. 197-223, and vol. II, pp. 359-406; V.D. Degan, L'interprétation des accords en droit international (The Hague, Nijhoff, 1963), p. 176, Myres S. McDougall, H.D. Laswell and J.C. Miller, The Interpretation of Agreements and World Public Order (Yale University Press, 1967), 410 pp., and Dordrecht, Nijhoff, 1993, 536 pp.; Serge Sur, L'interprétation en droit international public (Paris, LGDJ, 1974), 449 pp.; Mustapha Kamil Yasseen, "L'interprétation des traités d'après la Convention de Vienne", Recueil des cours de l'Académie de droit international de la Haye, 1976-III, vol. 151, pp. 1-114; or Marteen Bos, "Theory and practice of treaty interpretation", Netherlands International Law Review 1980, pp. 3-38 and 135-170.

(18) Suffice it to say, in a phrase often recalled by the International Court of Justice, that the expression "to construe" ("interprétation" in French) must be understood as meaning to give a precise definition of the meaning and scope of a binding legal instrument, 309/ in this case a treaty. What is essential is that interpreting is not revising. 310/ While reservations ultimately modify, if not the text of the treaty, at least the legal effect of its provisions, interpretative declarations are in principle limited to clarifying the meaning and the scope that the author State or international organization attributes to the treaty or to certain of its provisions. Since this paraphrases the commonly accepted definition of the "interpretation", the Commission considered that it would be tautological to include the term "to interpret" in the body of draft guideline 1.2.

(19) In conformity with an extremely widespread practice, the interpretation, which is the subject of such declarations, may relate either to certain provisions of a treaty or to the treaty as a whole. 311/ The gap in the 1969, 1978 and 1986 Vienna Conventions on that point, which led the Commission to adopt draft guideline 1.1.1 [1.1.4] on "across the board" reservations in order to take account of the practice actually followed by States and international organizations, was thus remedied by the wording adopted for draft guideline 1.2 and made it unnecessary for the Guide to Practice to include a provision equivalent to draft guideline 1.1.1 [1.1.4].

309/ See the Judgment of 16 December 1927, Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Permanent Court of International Justice Series A, No. 13, p. 10; see also the Judgment of 27 November 1950, Request for interpretation of the Judgment of November 20th, 1950, in the asylum case, I.C.J. Reports 1950, p. 402.

310/ See the Advisory Opinion of 18 July 1950, Interpretation of peace treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950, p. 229, or the Judgment of 27 August 1952, Rights of nationals of the United States of America in Morocco, I.C.J. Reports 1952, p. 196.

311/ Among a great many examples, see the interpretative declaration of Thailand concerning the Convention on the Elimination of All Forms of Discrimination against Women (Multilateral Treaties ..., chap. IV.8, p. 177) or that of New Zealand to the 1976 Convention on the Prohibition of Military and Hostile Use of Environmental Modification Techniques (ibid., chap. XXVI.1, p. 878); see also above, the declaration by the United Kingdom cited in note 281.

(20) According to some members of the Commission, the expression "the meaning or scope attributed by the declarant to the treaty" introduces an unduly subjective element into the definition of interpretative declarations, although most members consider that any unilateral interpretation is imbued with subjectivity. 312/ Moreover, in accordance with the very spirit of the definition of reservations, they may be distinguished from other unilateral declarations made with regard to a treaty by the legal effect aimed at by the declarant, i.e. by its intention (inevitably subjective). There is no reason to depart from the spirit of this definition as far as interpretative declarations are concerned.

(21) The Commission has also questioned whether the temporal element which is present in the definition of reservations 313/ should be included in the definition of interpretative declarations but has determined that the practical considerations which were based on the concern to avoid abuses and which led the framers of the 1969, 1978 and 1986 Vienna Conventions to adopt that solution 314/ do not arise with the same force in respect of interpretative declarations, at least those which the declarant formulates without making the proposed interpretation a condition for its participation. 315/

(22) In addition, it is doubtful whether such temporal limitations are justified with respect to interpretative declarations. It is not without

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312/ An agreement on interpretation constitutes an authentic (supposedly "objective") interpretation of the treaty (see draft guideline 1.5.3 [1.2.8]), but this relates to the legal regime of interpretative declarations, not to their definition.

313/ "'Reservation' means a unilateral statement ... made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty ..." (draft guideline 1.1, emphasis added).

314/ See paragraphs (3) and (4) of the commentary to draft guideline 1.1.2 in Report of the International Law Commission on the work of its fiftieth session, 1998, Official Records of the General Assembly, Fifty-third Session, Supplement No. 10 (A/53/10), pp. 204-205.

315/ See draft guideline 1.2.1 [1.2.4] and the commentary thereto.

relevance that the rules relating to reservations and those devoted to the interpretation of treaties appear in separate parts of the 1969 and 1986 Vienna Conventions: the former in Part II, relating to the conclusion and entry into force of treaties, and the latter in Part III, where they are side by side with the provisions relating to the observance and application of treaties. 316/

(23) This is to say that interpretative declarations formulated unilaterally by States or international organizations concerning the meaning or scope of the provisions of a treaty are and can be only some of the elements of the interpretation of such provisions. They coexist with other simultaneous, prior or subsequent interpretations which may be made by other contracting parties or third bodies entitled to give an interpretation that is authentic and binding on the parties.

(24) Thus, even if an instrument made by a party "in connection with the conclusion of a treaty" can, under certain conditions, be considered for the purposes of interpreting the treaty to be part of the "context", as expressly provided in article 31, paragraph 2 (b), of the 1969 and 1986 Vienna Conventions, this does not imply any exclusivity *ratione temporis*. Moreover, paragraph 3 of article 31 expressly invites the interpreter to take "into account, together with the context", any subsequent agreement between the

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316/ In fact, there is no gap between the formation and the application of international law or between interpretation and application: "*La mise en oeuvre de règles supposent leur interprétation préalable. Elle peut être explicite ou implicite, et dans ce cas se confond avec les mesures d'interprétation*" ("The implementation of rules implies that they have already been interpreted. Implementation may be explicit or implicit, in which case it may become confused with measures of interpretation"), (Serge Sur in Jean Combacu and Serge Sur, *Droit international public* (Paris, Montchrestien, 1997), p. 163). Some have even gone so far as to affirm that "*La règle de droit, dès l'instant de sa creation jusqu'au moment de son application aux cas singuliers est une affaire d'interprétation*" ("the rule of law, from the moment of its creation to the moments of its application to individual cases, is a matter of interpretation") (A.J. Arnaud, "*Le médium et le savant - signification politique de l'interprétation juridique", Archives de philosophie du droit*, 1972, p. 165) (quoted by Denys Simon in *L'interprétation judiciaire des traités d'organisations internationales* (Paris, Pédone), p.7).

parties and any subsequent practice followed. Such subsequent agreements or practices may be supported by interpretative declarations that may be formulated at any time in the life of the treaty: at its conclusion, at the time a State or international organization expresses its final consent to be bound, or at the time of application of the treaty. 317/

(25) This was the position taken by Sir Humphrey Waldock in his fourth report on the law of treaties, in which he pointed out that a declaration could have been made

> "during the negotiations, or at the time of signature, ratification, etc., or later, in the course of the 'subsequent practice'". 318/

(26) Independently of these general considerations, to confine the formulation of interpretative declarations to a limited period of time, as the definition of reservations does, would have the serious drawback of being inconsistent with practice. Even if it is quite often at the moment they express their consent to be bound that States and international organizations formulate such declarations, that is not always the case.

(27) It is indeed striking to note that States tend to get around the ratione temporis limitation of the right to formulate reservations by submitting them, occasionally out of time, as interpretative declarations. This was the case, for example, of the "declaration" made by Yugoslavia in

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317/ This last possibility was recognized by the International Court of Justice in its Advisory Opinion of 11 July 1950 concerning the International Status of South-West Africa: "Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument" (I.C.J. Reports 1950, pp. 135-136); in fact, the Court based itself on declarations made by South Africa in 1946 and 1947 on the interpretation of its mandate over South-West Africa, an agreement that had been concluded in 1920.

318/ Yearbook ... 1964, vol. II, p. 52.

respect of the 1971 Treaty on the Denuclearization of the Seabed 319/ or of the declaration made by Egypt regarding the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. 320/ In these two cases, the "declarations" elicited protests on the part of the other contracting parties, who were motivated by the fact that the declarations were actually reservations and, in the second case, the fact that article 26 of the Basel Convention (which prohibits reservations) authorizes States to formulate declarations, within certain limits, only "when signing, ratifying, accepting, approving, ... confirming or acceding to this Convention". One can conclude a contrario that, if true interpretative declarations had been involved (and if the Basel Convention had not set any time limits), the declarations could have been formulated at a time other than the moment of signature or consent to be bound.

(28) This is in fact quite normal in practice. It should be pointed out, as Professor Greig does, that, when they formulate objections to reservations or react to interpretative declarations formulated by other contracting parties, States or international organizations often go on to propose their own interpretation of the treaty's provisions. 321/ There is no prima facie reason not to consider such "counter-proposals" as veritable interpretative declarations, at least when they seek to clarify the meaning and scope of the treaty in the eyes of the declarant; however, they are by definition formulated after the time at which the formulation of a reservation is possible.

319/ See note 303 above.

320/ See Multilateral Treaties ..., chap. XXVII.3, note 5, pp. 924-925.

321/ In this connection, see D.W. Greig, "Reservations: Equity as a Balancing Factor?", Australian Yb. I.L. 1995, pp. 24 and 42-45. See the example cited by this author (p. 43) of the reactions of the Netherlands to the reservations of Bahrain and Qatar to article 27, paragraph 3, of the Vienna Convention on Diplomatic Relations or the "counter-interpretation" of articles I and II of the Non-Proliferation Treaty made by the United States of America in reaction to point 8 of the Italian declaration concerning that treaty (United Nations, Treaty Series, vol. 1078, pp. 417-418).

(29) Under these circumstances, in the opinion of a majority of the members of the Commission, it would hardly seem possible to include in a general definition of interpretative declarations a specification of the time at which such a declaration is to be made.

(30) The Commission wishes to make it clear, however, that the fact that draft guideline 1.2 is silent about the moment at which an interpretative declaration may be made, out of concern not to limit unduly the freedom of action of States and international organizations and not to go against a well-established practice, should not be seen as encouragement to formulate such declarations at inappropriate times. Even though "simple" interpretative declarations [322] are not binding on the other contracting parties, such an attitude could lead to abuse and create difficulties. By way of a remedy, it might be expedient for the parties to a treaty to try to avoid anarchical interpretative declarations by specifying in a limitative manner when such declarations may be made, as is the case in the 1982 Montego Bay Convention on the Law of the Sea, [323] and the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. [324]

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[322] As opposed to conditional interpretative declarations, which are the subject of draft guideline 1.2.1 [1.2.4].

[323] Article 310: "Article 309 [which excludes reservations] does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State" (emphasis added).

[324] Article 26: "1. No reservation or exception may be made to this Convention. Paragraph 1 of this Article does not preclude a State or political and/or economic integration organization, when signing, ratifying, accepting, approving, formally confirming or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of the Convention in their application to that State" (emphasis added).

(31) The silence of draft guideline 1.2 on the moment when an interpretative declaration may be formulated should not lead one to conclude, however, that an interpretative declaration may in all cases be formulated at any time:

(a) For one thing, this might be formally prohibited by the treaty itself; [325]

(b) Furthermore, it would seem to be out of the question that a State or international organization could formulate a conditional interpretative declaration [326] at any time in the life of the treaty: such laxity would cast an unacceptable doubt on the reality and scope of the treaty obligations;

(c) And, lastly, even simple interpretative declarations can be invoked and modified at any time only to the extent that they have not been expressly accepted by the other parties to the treaty or that an estoppel has not been raised against them.

(32) These are questions that will have to be clarified in chapter II of the Guide to Practice, on the formulation of reservations and interpretative declarations.

(33) It goes without saying that this definition in no way prejudges the validity or the effect of such declarations and that the same precautions taken with respect to reservations must be applied to interpretative declarations: the proposed definition is without prejudice to the permissibility and the effects of such declarations from the standpoint of the rules applicable to them. The Commission extended the draft guideline that it provisionally adopted in 1998 [327] along these lines, so that this important caveat covers not only reservations, but also interpretative declarations and, more generally, all unilateral statements made in respect of a treaty. [328]

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[325] See the examples given in notes 323 and 324 above.

[326] See draft guideline 1.2.1 [1.2.4] and the commentary thereto.

[327] See the Report of the International Law Commission on the work of its fiftieth session, 1998, Official Records of the General Assembly, Fifty-third Session, Supplement No. 10 (A/53/10), pp. 213 to 214.

[328] See draft guideline 1.6 and the commentary thereto.

(34) In the light of this comment, the definition in draft guideline 1.2 has, in the Commission's view, the dual advantage of making it possible to distinguish clearly between interpretative declarations and reservations, on the one hand, and, on the other, between interpretative declarations and other unilateral statements made in respect of a treaty, while being sufficiently general to encompass different categories of interpretative declarations; 329/ in particular, it encompasses both conditional and simple interpretative declarations, the distinction between which is covered in draft guideline 1.2.1 [1.2.4].

1.2.1 [1.2.4] Conditional interpretative declarations

A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.

Commentary

(1) In accordance with the definition given in draft guideline 1.2, interpretative declarations can be seen as "offers" of interpretation, governed by the fundamental principle of good faith, but lacking any inherent authentic or binding character. However, their authors frequently endeavour to broaden their scope, so that they come closer to being a reservation without actually becoming one. This is what happens when a State or international organization does not merely propose an interpretation, but makes its interpretation a condition of its consent to be bound by the treaty.

329/ On ways of applying this distinction, see draft guidelines 1.3 to 1.3.3 [1.2.3].

(2) The members of the Commission have unanimously recognized the existence of such a practice, which was not systematized in the legal doctrine until relatively recently, 330/ while continuing to explore the exact legal nature of such unilateral statements.

(3) It is not uncommon for a State, when formulating a declaration, to state expressly that its interpretation constitutes the sine qua non to which its consent to be bound is subordinate. For example, France attached to its signature 331/ of Additional Protocol II of the Treaty of Tlatelolco a four-point interpretative declaration, stipulating:

> "In the event that the interpretative declaration thus made by the French Government should be contested wholly or in part by one or more Contracting Parties to the Treaty or to Protocol II, these instruments

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330/ The distinction between these two types of interpretative declaration was clearly and authoritatively drawn by Professor D.M. McRae in an important article published in 1978. Exploring the effect of interpretative declarations, he noted that "two situations have to be considered. The first is where a State attaches to its instrument of acceptance a statement that simply purports to offer an interpretation of the treaty or part of it. This may be called a 'simple interpretative declaration' [They are referred to as 'mere declaratory statements' by Detter, Essays on the Law of Treaties, 1967, pp. 51-52]. The second situation is where a State makes its ratification of or accession to a treaty subject to, or on condition of, a particular interpretation of the whole or part of the treaty. This may be called a 'qualified interpretative declaration'. In the first situation the State has simply indicated its view of the interpretation of the treaty, which may or may not be the one that will be accepted in any arbitral or judicial proceedings. In offering this interpretation the State has not ruled out subsequent interpretative proceedings nor has it ruled out the possibility that its interpretation will be rejected. [...] If, on the other hand, the declaring State wishes to assert its interpretation regardless of what a subsequent tribunal might include, that is, the State when making the declaration has ruled out the possibility of a subsequent inconsistent interpretation of the treaty, a different result should follow. This is a 'qualified interpretative declaration'. The State is making its acceptance of the treaty subject to or conditional upon acquiescence in its interpretation". (D.M. McRae, "The Legal Effect of Interpretative Declarations", B.Y.B.I.L. 1978, pp. 160-161). The expression "qualified interpretative declaration" has little meaning in French. This distinction has been used by a number of authors; for example, see Iain Cameron and Frank Horn, "Reservations to the European Convention on Human Rights: The Belilos Case", G.Y.B.I.L. 1990, p. 77 or Rosario Sapienza, Dichiarazioni interpretative unilaterali e trattati internazionali, op. cit. (note 283 above), pp. 205-206.

331/ The declaration was confirmed upon ratification on 22 March 1974; see the United Nations, Treaty Series, vol. 936, p. 419.

> shall be null and void in relations between the French Republic and the contesting State or States".

The conditional nature of the French declaration here is indisputable.

(4) Although it is drafted less categorically, the same can surely be said of the "understanding" recorded by the Islamic Republic of Iran in connection with the United Nations Convention on the Law of the Sea:

> "The main objective [of the Government of the Islamic Republic of Iran] for submitting these declarations is the avoidance of eventual future interpretation of the following articles in a manner incompatible with the original intention and previous positions or in disharmony with national laws and regulations ..." 332/

(5) In other cases, the conditional nature of the declaration can be deduced from its drafting. For example, its categorical wording leaves little doubt that the interpretative declaration made by Israel upon signing the International Convention Against the Taking of Hostages of 17 December 1979 should be considered a conditional interpretative declaration:

> "It is the understanding of Israel that the Convention implements the principle that hostage taking is prohibited in all circumstances and that any person committing such an act shall be either prosecuted or extradited pursuant to article 8 of this Convention or the relevant provisions of the Geneva Conventions of 1949 or their Additional Protocols, without any exception whatsoever." 333/

(6) The same holds true for the interpretative declaration made by Turkey in respect of the 1976 Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques:

> "In the opinion of the Turkish Government the terms 'widespread', 'long-lasting' and 'severe effects' contained in the Convention need to be clearly defined. So long as this clarification is not made the Government of Turkey will be compelled to interpret itself the terms in question and consequently it reserves the right to do so as and when required." 334/

332/ Multilateral Treaties ..., chap. XXI.6, p. 811.

333/ Ibid., chap. XVIII.5, p. 727.

334/ Ibid., chap. XXVI.1, p. 878.

(7) Conversely, a declaration such as the one made by the United States of America when signing the 1988 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution is clearly a simple interpretative declaration:

> "The Government of the United States of America understands that nations will have the flexibility to meet the overall requirements of the protocol through the most effective means." 335/

(8) It is in fact only rarely that the conditional nature of an interpretative declaration is so clearly apparent from the wording used. 336/ In such situations the distinction between "simple" and "conditional" interpretative declarations poses problems similar to those posed by the

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335/ Ibid., chap. XXVII.1, p. 903.

336/ Most often, the declaring State or international organization simply says that it "considers that ..." ("considère que ...") (for examples (of which there are a great many), see the declarations made by Brazil when signing the United Nations Convention on the Law of the Sea (ibid., chap. XXI.6, p. 804), the third declaration made by the European Community when signing the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (ibid., chap. XXVII.4, p. 927), or those made by Bulgaria to the Vienna Convention on Consular Relations of 1963 (ibid., chap. III.6, p. 71) or to the 1974 Convention on a Code of Conduct for Liner Conferences (ibid., chap. XII.6, p. 641)), "estime que ..." (see the declaration made by Sweden concerning the Convention establishing the International Maritime Organization (ibid., chap. XII.1, p. 614)), or "declares that ..." (see the second and third declarations made by France concerning the 1966 International Covenant on Economic, Social and Cultural Rights (ibid., chap. IV.3, p. 112) or that made by the United Kingdom when signing the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (ibid., chap. XXVII.3, p. 923)), or that it "interprets" a particular provision in a particular way (see the declarations made by Algeria or Belgium in respect of the International Covenant on Economic, Social and Cultural Rights (ibid., chap. IV.3, pp. 111 and 112), the declaration made by Ireland in respect of article 31 of the 1954 Convention relating to the Status of Stateless Persons (ibid., chap. V.3, p. 250) or the first declaration made by France when signing the 1992 Convention on Biological Diversity (ibid., chap. XXVII.8, p. 938)), or that, "according to its interpretation", a particular provision has a certain meaning (see the declarations by the Netherlands concerning the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects of 10 October 1980 (ibid., chap. XXVI.2, p. 885) or those made by Fiji, Kiribati, Nauru, Papua New Guinea and Tuvalu in respect of the 1992 United Nations Framework Convention on Climate Change (ibid., chap. XXVII.7, pp. 933-934)) or that it "understands that ..." (see the declarations made by Brazil when ratifying the United Nations Convention on the Law of the Sea (ibid., chap. XXI.6, p. 804)).

distinction between reservations and interpretative declarations, and these problems must be solved in accordance with the same principles. 337/

(9) Moreover, it is not uncommon for the true nature of interpretative declarations to become clear when they are contested by other contracting parties. This is demonstrated by some famous examples, such as the declaration that India attached to its instrument of ratification of the constituent instrument of the Inter-Governmental Maritime Consultative Organization 338/ or Cambodia's declaration with regard to the same

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337/ See draft guideline 1.3.1.

338/ The text of the declaration appears in Multilateral Treaties ..., chap. XII.1, p. 613.

> "When the Secretary-General notified IMCO of the instrument of ratification of India subject to the declaration, it was suggested that in view of the condition which was 'in the nature of a reservation' the matter should be put before the IMCO Assembly. The Assembly resolved to have the declaration circulated to all IMCO members but until the matter had been decided, India was to participate in IMCO without vote. France and the Federal Republic of Germany lodged objections against the declaration made by India, France on the ground that India was asserting a unilateral right to interpret the Convention and Germany on the ground that India might in the future take measures that would be contrary to the Convention.
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> "In resolution 1452 (XIV) adopted on 7 December 1959, the General Assembly of the United Nations, noting the statement made on behalf of India at the 614th meeting of the Sixth Committee (Legal) explaining that the Indian declaration on IMCO was a declaration of policy and that it did not constitute a reservation, expressed the hope 'that, in the light of the above-mentioned statement of India an appropriate solution may be reached in the Inter-Governmental Maritime Consultative Organization at an early date to regularize the position of India'.
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> "In a resolution adopted on 1 March 1960, the Council of the Inter-Governmental Maritime Consultative Organization, taking note of the statement made on behalf of India referred to in the foregoing resolution and noting, therefore, that the declaration of India has no legal effect with regard to the interpretation of the Convention 'considers India to be a member of the Organization'." (India's reply to the International Law Commission questionnaire on reservations to treaties.)

With regard to this episode, see in particular D.M. McRae, "The legal effect of interpretative declarations", B.Y.B.I.L. 1978, pp. 163-165; Frank Horn, Reservations and Interpretative Declarations to Multilateral

Convention. 339/ These precedents confirm that there is a discrepancy between some declarations, in which the State or international organization formulating them does no more than explain its interpretation of the treaty, and others in which the authors seek to impose their interpretation on the other contracting parties.

(10) This discrepancy is of great practical significance. Unlike reservations, simple interpretative declarations place no conditions on the expression by a State or international organization of its consent to be bound; they simply attempt to anticipate any dispute that may arise concerning the interpretation of the treaty. The declarant "sets a date", in a sense; it gives notice that, should a dispute arise, its interpretation will be such, but it does not make that point a condition for its participation in the treaty. Conversely, conditional declarations are closer to reservations in that they seek to produce a legal effect on the provisions of the treaty, which the State or international organization accepts only on condition that the provisions are interpreted in a specific way.

(11) This being the case, some members of the Commission wondered whether conditional interpretative declarations should not be treated purely and simply as reservations. Although there is support for this position in

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Treaties, op. cit. (note 266 above), pp. 301-302; Rosario Sapienza, Dichiarazioni interpretative unilaterali e trattati internazionali, op. cit. (note 283 above), pp. 108-113.

339/ The text appears in Multilateral Treaties, chap. XII.1, pp. 612-613. Several Governments stated "that they assumed that it was a declaration of policy and did not constitute a reservation; and that it had no legal effect with regard to the interpretation of the Convention". Accordingly, "[i]n a communication addressed to the Secretary-General on 31 January 1962, the Government of Cambodia stated that '... the Royal Government agrees that the first part of the declaration which it made at the time of the acceptance of the Convention is of a political nature. It therefore has no legal effect regarding the interpretation of the Convention. The statements contained [in the second part of the declaration?], on the other hand, constitute a reservation to the Convention by the Royal Government of Cambodia'" (ibid., note 10). With regard to this episode, see in particular D.M. McRae, "The Legal Effect of Interpretative Declarations; B.Y.B.I.L. 1978, pp. 165-166; Rosario Sapienza, Dichiarazioni interpretative unilaterali e trattati internazionali, op. cit. (note 283 above), pp. 177-178.

doctrine, 340/ the Commission does not believe that these two categories of unilateral statement are identical: even when it is conditional, an interpretative declaration does not constitute a reservation in that it does not try "to exclude or to modify the legal effect of certain provisions of the treaty in their application" to the State or organization formulating it, but to impose a specific interpretation on those provisions. Even if the distinction is not always obvious, there is an enormous difference between application and interpretation. "The mere fact that a ratification is conditional does not necessarily mean that the condition needs to be treated as a reservation." 341/

(12) This is in fact the direction taken in jurisprudence:

In the Belilos case, the European Court of Human Rights considered the validity of Switzerland's interpretative declaration from the standpoint of the rules applicable to reservations, yet without assimilating one to the other; 342/

Likewise, in a text that is admittedly rather obscure, the Arbitral Tribunal that settled the dispute between France and the United Kingdom concerning the continental shelf in the Mer d'Iroise case analysed the third reservation by France concerning article 6 of the 1958 Geneva Convention "as a particular condition posed by the French Republic for its acceptance of the delimitation system provided for in article 6", adding: "To judge by its

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340/ See D.M. McRae, "The Legal Effect of Interpretative Declarations", B.Y.B.I.L., 1978, p. 172.

341/ D.W. Greig, "Reservations: Equity as a Balancing Factor?" Australian Yearbook of International Law, 1995, p. 31; see also Frank Horn, Reservations and Interpretative Declarations to Multilateral Treaties, op. cit. (note 266 above), p. 239.

342/ Although it did not formally reclassify Switzerland as a reservation, the Court examined "the validity of the interpretative declaration in question, as in the case of a reservation" (Judgement of 21 May 1988, Publications of the European Court of Human Rights, Series A., vol. 132, para. 49, p. 21). In the Temeltasch case, the European Commission of Human Rights was less cautious: completely (and intentionally) adhering to Professor McRae's position (note 85 above), it "assimilated" the notions of conditional interpretative declarations and reservations (decision of 5 May 1982, Decisions and Reports, April 1983, pp. 130-131).

terms, this condition would seem to go beyond a simple interpretation". 343/ This would seem to establish a contrario that it could have been a conditional interpretative declaration and not a reservation in the strict sense of the term.

(13) The fact remains that, even if it cannot be entirely "assimilated" to a reservation, a conditional interpretative declaration does come quite close, for as Paul Reuter has written: "[l'] essence de la 'réserve' est de poser une condition: l'État ne s'engage qu'à la condition que certains effets juridiques du traité ne lui soient pas appliqués, que ce soit par l'exclusion ou la modification d'une règle ou par l'interprétation de celle-ci" ("the essence of 'reservations' is to stipulate a condition: the State will commit itself only on condition that certain legal effects of the treaty are not applied to it, either by excluding or modifying a rule or by interpreting it"). 344/

(14) Consequently, it seems highly probable that the legal regime of conditional interpretative declarations would be infinitely closer to that of reservations, especially with regard to the anticipated reactions of the other contracting parties to the treaty, than would the rules applicable to simple interpretative declarations, which essentially fall under the "general rule of interpretation" codified in article 31 of the 1969 and 1986 Vienna Conventions. Nevertheless, as this chapter of the Guide to Practice is

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343/ Decision of 30 June 1977, Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, United Nations Reports of International Arbitral Awards, vol. XVIII, para. 55, p. 169.

344/ Paul Reuter, Introduction au droit des traités, 3rd ed., revised and expanded by Philippe Cahier (Paris, PUF, 1995), p. 71. The inherent conditional character of reservations is stressed in numerous doctrinal definitions, including that of the Harvard Law School (Research in International Law of the Harvard Law School, "Draft Convention on the Law of Treaties", A.J.I.L. 1935, supplt. No. 4, p. 843; see also Frank Horn, Reservations and Interpretative Declarations to Multilateral Treaties, op. cit. (note 266 above), p. 35 and the examples cited). The definition proposed by Sir Humphrey Waldock in 1962 also specifically included conditionality as an element in the definition of reservations (see Yearbook ... 1962, vol. II, A/CN.4/144, p. 31); it was subsequently abandoned in circumstances that are not clear.

devoted exclusively to defining reservations and, by way of contrast, interpretative declarations, it is not the place in which to dwell at length on the consequences of the distinction between the two types of interpretative declaration.

(15) In view of the foreseeable consequences of the distinction and its practical importance, it should be included in the Guide to Practice. However, bearing in mind the striking degree to which reservations overlap with conditional interpretative declarations, the Commission considered the advisability of including in the definition of conditional interpretative declarations the ratione temporis element, which is an integral part of the definition of reservations.

(16) Despite the hesitations of some members, the Commission thought that, while the element unquestionably had no place in the definition of simple interpretative declarations, 345/ it was certainly indispensable for conditional interpretative declarations, for reasons comparable to those which have necessitated its inclusion regarding reservations: such declarations, by definition, constitute conditions for the declarant's participation in the treaty. Consequently, in order to prevent, insofar as possible, disputes among the parties, as to the reality and scope of their commitment under the treaty, strict rules should be followed with regard to the moment at which such declarations may be formulated, rules which seem inherent in the very definition of the declarations.

(17) At the suggestion of some members, the Commission considered whether, instead of reproducing the long list of moments at which a reservation (and, by extension, a conditional interpretative declaration) may be formulated, as in draft guideline 1.1, it might not be simpler and more elegant to use a general phrase such as "at the moment of expression of consent to be bound".

345/ See draft guideline 1.2 and paragraphs 21 to 32 of the commentary thereto.

It does not seem possible to adopt this solution, however, since interpretative declarations, like reservations, may be formulated at the time of signature, even in the case of treaties in solemn form. 346/

(18) The Commission further considers that the provisions in draft guideline 1.1.2 concerning "instances in which a reservation may be formulated" 347/ could also be transposed to the formulation of conditional interpretative declarations.

1.2.2 [1.2.1] Interpretative declarations formulated jointly

The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral nature of that interpretative declaration.

Commentary

(1) Like reservations, interpretative declarations, whether simple or conditional, may be formulated jointly by two or more States or international organizations. Draft guideline 1.1.7 [1.1.1], 348/ which acknowledges this possibility in respect of reservations, nonetheless appears to be an element of progressive development of international law, since there is no clear precedent in this regard. 349/ The same is not true with regard to interpretative declarations, the joint formulation of which comes under the heading of lex lata.

(2) Indeed, as in the case of reservations, it is not uncommon for several States to consult one another before formulating identical or quite similar declarations. This was the case, for example, with several

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346/ Probably provided that, in such situations, the reservation or conditional interpretative declaration is confirmed at the time of expression of definitive consent to be bound. The Commission intends to examine this matter in greater depth in chapter II of the Guide to Practice, relating to the formulation of reservations and interpretative declarations.

347/ See Report of the International Law Commission on the work of its fiftieth session, 1998, Official Records of the General Assembly, Fifty-third Session, Supplement No. 10 (A/53/10), p. 203.

348/ See Report of the International Law Commission on the work of its fiftieth session, 1998, Official Records of the General Assembly, Fifty-third Session, Supplement No. 10 (A/53/10), p. 210.

349/ See the commentary to draft guideline 1.1.7 [1.1.1], ibid., para. 3, pp. 211-212.

interpretative declarations formulated by the "Eastern bloc" countries prior to 1990, 350/ with those made by the Nordic countries in respect of several conventions, 351/ or with the declarations made by 13 States members of the European Community when signing the 1993 Convention on the Prohibition of Chemical Weapons and confirmed upon ratification, which stated:

> "As a Member State of the European Community, [each State] will implement the provisions of the Convention on the Prohibition of Chemical Weapons, in accordance with its obligations arising from the rules of the Treaties establishing the European Communities to the extent that such rules are applicable." 352/

(3) At the same time, and contrary to what has occurred thus far in reservations, there have also been truly joint declarations, formulated in a single instrument, by "the European Community and its Member States" or by the latter alone. This occurred in the case of:

(a) Examination of the possibility of accepting annex C.1 of the 1976 Protocol to the Agreement on the Importation of Educational, Scientific and Cultural Materials; 353/

(b) Implementation of the United Nations Framework Convention on Climate Change of 9 May 1992; 354/

(c) Implementation of the Convention on Biological Diversity of 5 June 1992; 355/

350/ See, for example, the declarations by Belarus, Bulgaria, Hungary, Mongolia, Romania, the Russian Federation and Ukraine concerning articles 48 and 50 of the Vienna Convention on Diplomatic Relations (Cuba formulated an express reservation; the wording of Viet Nam's declaration is ambiguous) (Multilateral Treaties ..., chap. III.3, pp. 56-58) or those of Albania, Belarus, Bulgaria, Poland, Romania, the Russian Federation and Ukraine concerning article VII of the Convention on the Political Rights of Women (ibid., chap. XVI.1, pp. 682-683).

351/ See, for example, the declarations by Denmark, Finland, Iceland, Norway and Sweden concerning article 22 of the Vienna Convention on Consular Relations (ibid., chap. III.6, pp. 72-74).

352/ Ibid., chapter XXVI.3, pp. 890-892.

353/ Ibid., chapter XIV.5, p. 667.

354/ Ibid., chapter XXVII.7, p. 933.

355/ Ibid., chapter XXVII.8, p. 937.

(d) Implementation of the Agreement of 4 August 1995 on Straddling Fish Stocks. 356/

(4) These are real precedents which justify a fortiori the adoption of a draft guideline on interpretative declarations similar to draft guideline 1.1.7 [1.1.1] on reservations.

(5) As is the case with reservations, it must be understood, first, that this possibility of joint formulation of interpretative declarations cannot undermine the legal regime applicable to such declarations, governed largely by "unilateralism" 357/ and, second, that the conjunction "or" used in draft guideline 1.2.2 [1.2.1] 358/ does not exclude the possibility that interpretative declarations may be formulated jointly by one or more States and by one or more international organizations, and should be understood to mean "and/or". Nevertheless, the Commission considered that this formulation would make the text too cumbersome. 359/

(6) The similarity between the wording of draft guidelines 1.1.7 [1.1.1] and 1.2.2 [1.2.1] does not mean that the same legal regime is applicable to interpretative declarations formulated jointly, on the one hand, and to reservations formulated jointly, on the other. In particular, the fact that the former may be formulated orally while the latter may not, 360/ could have an effect on that regime. This problem relates to the substance of the applicable law and not to the definition of interpretative declarations, however.

(7) The Commission also considered whether there might be reason to envisage the possibility of all of the contracting parties formulating an

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356/ Ibid., chapter XXI.7, pp. 839-840.

357/ See the commentary to draft guideline 1.1.7 [1.1.1] in Report of the International Law Commission on the work of its fiftieth session, 1998, Official Records of the General Assembly, Fifty-third Session, Supplement No. 10 (A/53/10), para. 8, p. 213.

358/ "... by several States or international organizations ...".

359/ See the commentary to draft guideline 1.1.7 [1.1.1] in Report of the International Law Commission on the work of its fiftieth session, 1998, Official Records of the General Assembly, Fifty-third Session, Supplement No. 10 (A/53/10), para. 9, p. 213.

360/ See the commentary to draft guideline 1.2, note 300.

interpretative declaration jointly, and whether in such a situation the proposed interpretation would not lose the character of a unilateral act and become a genuinely collective act. The Commission concluded that this is not the case: the word "several" in draft guideline 1.2.2 [1.2.1] precludes such a possibility, which in any case is covered by article 31, paragraphs 2 (a) and 3 (a), of the 1969 and 1986 Vienna Conventions concerning collateral agreements relating to the interpretation or application of the treaty.

1.3 Distinction between reservations and interpretative declarations

The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.

Commentary

(1) A comparison of draft guidelines 1.1 and 1.2 shows that interpretative declarations are distinguished from reservations principally by the objective pursued by the author State or international organization: in formulating a reservation, the State or organization purports to exclude or modify the legal effect upon itself of certain provisions of a treaty (or of the treaty as a whole with respect to certain aspects); in making an interpretative declaration, it intends to specify or clarify the meaning or scope attributed by it to a treaty or to certain of its provisions.

(2) In other words,

The character of a unilateral statement as a reservation depends on the question whether its object is to exclude or modify the legal effect of the provisions of the treaty in their application to the author State or international organization; and

The character of a unilateral statement as an interpretative declaration depends on the question whether its object is to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.

(3) This is confirmed in the jurisprudence. For example, in the Belilos case, "[l]ike the Commission and the Government, the [European] Court [of Human Rights] recognizes that it is necessary to ascertain the original

intention of those who drafted the declaration". 361/ Likewise, in the Mer d'Iroise case, the Franco-British Arbitral Tribunal held that, in order to determine the nature of the reservations and declarations made by France regarding the 1958 Convention on the Continental Shelf, "[t]he question [was] one of the respective intentions of the French Republic and the United Kingdom in regard to their legal relations under the Convention ...". 362/

(4) This distinction is fairly clear as to its principle, yet it is not easily put into practice, particularly since States and international organizations seldom explain their intentions, even taking pains at times to disguise them, and since the terminology used does not constitute an adequate criterion for distinguishing them. The objective of this section of the Guide to Practice is to provide some information regarding the substantive rules 363/ that should be applied in order to distinguish between reservations and interpretative declarations.

(5) These guidelines may be transposed, mutatis mutandis, to the equally important distinction between simple interpretative declarations and conditional interpretative declarations which, as demonstrated by draft guideline 1.2.1 [1.2.4], is also based on the intention of the declarant. In both cases, the declarant seeks to interpret the treaty, but in the first case it does not make its interpretation a condition for participation in the treaty, whereas in the second case, its interpretation cannot be dissociated from the expression of its consent to be bound.

1.3.1 Method of implementation of the distinction between reservations and interpretative declarations

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an

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361/ European Court of Human Rights, 29 April 1988, Publications of the European Court of Human Rights, Series A, vol. 132, para. 48, p. 23; emphasis added.

362/ Decision of 30 June 1977, Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, United Nations - Reports of International Arbitral Awards, vol. XVIII, para. 30, p. 28; emphasis added.

363/ The rules of procedure concerning the formulation of reservations and interpretative declarations will be the subject of draft guidelines in chapter II of the Guide to Practice.

interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in the light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

Commentary

(1) The object of this draft guideline is to indicate the method that should be employed to determine whether a unilateral statement is a reservation or an interpretative declaration. This question is of considerable importance when, in keeping with the definition of such instruments, 364/ all "nominalism" is excluded.

(2) As made clear by draft guideline 1.3, the decisive criterion for drawing the distinction is the legal effect that the State or international organization making the unilateral statement purports to produce. Hence, there can be doubt that the declarant's intention when formulating it should be established. Did the declarant purport to exclude or modify the legal effect upon it of certain provisions of the treaty (or of the treaty as a whole in respect of certain aspects) or did it intend to specify or clarify the meaning or scope it attributes to the treaty or certain of its provisions? In the first case it is a reservation; in the second, it is an interpretative declaration.

(3) It was asked whether, in the doctrine, in order to answer these questions, it was appropriate to apply a "subjective test" (what did the declarant want to say?) or "objective" or "material" test (what did the declarant do?) In the Commission's view, it is a spurious alternative. The expression "purports to", which appears in the definition both of reservations and of interpretative declarations, simply means that the legal effect sought by the author cannot be achieved for various reasons (wrongfulness, objections by other contracting parties); but this does not in any way mean that the subjective test alone is applicable: only an analysis of the potential - and objective - effects of the statement can determine the purpose sought. In

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364/ See draft guidelines 1.1 and 1.2, which expressly define them independently of their phrasing or name. The fact remains, however, that the latter are of no utility in drawing the distinction (see infra, draft guideline 1.3.2 [1.2.2]).

determining the legal nature of a statement formulated in connection with a treaty, the decisive criterion lies in the effective result that implementing the statement has (or would have). If it modifies or excludes the legal effect of the treaty or certain of its provisions, it is a reservation "however phrased or named"; if the statement simply clarifies the meaning or scope that its author attributes to the treaty or certain of its provisions, it is an interpretative declaration.

(4) The point of departure should be the principle that the purpose sought is reflected in the text of the statement. It is therefore a quite conventional problem of interpretation that can be resolved by means of the normal rules of interpretation in international law. "Discerning the real substance of the often complex statements made by States upon ratification of, or accession to, a multilateral treaty is a matter of construction and must be solved through the ordinary rules of interpretation." 365/

(5) Some international courts have not hesitated to apply the general rules of interpretation of treaties to reservations, 366/ and this seems all the more reasonable in that, unlike other unilateral statements formulated in connection with a treaty, 367/ they are indissociable from the treaty to which they apply. However, in the Commission's view, while the rules provide useful indications, they cannot be purely and simply transposed to reservations and interpretative declarations because of their special nature. The rules applicable to treaty instruments cannot be applied to unilateral instruments without some care.

(6) This was pointed out recently by the International Court of Justice in connection with optional declarations of acceptance of its compulsory jurisdiction:

> "The regime relating to the interpretation of declarations made under Article 36 of the Statute is not identical with that established for the interpretation of treaties by the Vienna Convention on the Law of

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365/ Massimo Coccia, "Reservations to Multilateral Treaties on Human Rights", California Western International Law Journal, 1985, p. 10.

366/ See Inter-American Court of Human Rights, Advisory Opinion of 8 September 1983, OC-3/83, Restrictions to the death penalty (articles 4 (2) and 4 (4) of the Inter-American Convention on Human Rights), para. 62, p. 84.

367/ See infra, section 1.4 of the Guide to Practice.

> Treaties (...) The Court observes that the provisions of that Convention may only apply analogously to the extent compatible with the sui generis character of the unilateral acceptance of the Court's jurisdiction. 368/

(7) The Commission is aware that the statements in question are of a different nature from those of reservations and unilateral declarations. Formulated unilaterally in connection with a treaty text, they nonetheless have important common features and it would seem necessary to take account of the Court's warning in interpreting unilateral statements made by a State or an international organization in connection with a treaty with a view to determining its legal nature. Bearing these considerations in mind, the Commission did not purely and simply refer to the "General rule of interpretation" and the "Supplementary means of interpretation" set out in articles 31 and 32 of the 1969 and 1986 Vienna Conventions.

(8) This remark notwithstanding the fact remains that these provisions constitute useful guidelines and, in particular, like a treaty, a unilateral statement relating to the provisions of a treaty:

> "... must be interpreted by examining its text in accordance with the ordinary meaning which must be attributed to the terms in which it has been formulated within the general context of the treaty (...). This approach must be followed except when the resultant interpretation would leave the meaning ambiguous or obscure or would lead to a result which is manifestly absurd or unreasonable. (...)
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> "Thus without excluding the possibility that supplementary means of interpretation might, in exceptional circumstances, be resorted to, the interpretation of reservations must be guided by the primacy of the text." 369/

368/ ICJ, judgment of 4 December 1998, case concerning Fisheries jurisdiction (Spain v. Canada) jurisdiction of the Court, para. 46; see also the judgment of 11 June 1998 in Land and maritime boundary between Cameroon and Nigeria (Preliminary Objections), para. 30.

369/ Inter-American Court of Human Rights, Advisory Opinion of 8 September 1983, OC-3/83 Restrictions to the death penalty (articles 4 (2) and (4) of the Inter-American Convention on Human Rights, paras. 63-64, pp. 84-85.

(9) Even though doctrine has barely contemplated the problem from this standpoint, 370/ jurisprudence is unanimous in considering that priority must be given to the actual text of the declaration:

> "This condition [imposed by the third French reservation to article 6 of the Geneva Convention on the Continental Shelf], *according to its terms*, appears to go beyond a mere interpretation ... the Court, ... accordingly, concludes that this 'reservation' is to be considered a 'reservation' rather than an 'interpretative declaration'"; 371/
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> "In the instant case, the Commission will interpret the intention of the respondent Government by taking account both of *the actual terms of the above-mentioned interpretative declaration* and the *travaux préparatoires* which preceded Switzerland's ratification of the [European] Convention [on Human Rights].
>
> "The Commission considers that *the terms used, taken by themselves*, already show an intention by the Government to prevent ...
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> [...]
>
> "*In the light of the terms used* in Switzerland's interpretative declaration ... and the above-mentioned *travaux préparatoires* taken as a whole, the Commission accepts the respondent Government's submission that it intended to give this interpretative declaration the effect of a formal reservation"; 372/

370/ See, however, Frank Horn, Reservations and Interpretative Declarations to Multilateral Treaties, op. cit. (note 266 above), pp. 33 and 263-272 and, for a clearer and more concise account, D.W. Greig, "Reservations: Equity as a Balancing Factor?", Australian Yb.I.L. 1995, p. 26.

371/ Arbitral decision of 30 June 1977, Case concerning the delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic, United Nations, Reports of International Arbitral Awards, vol. XVIII, para. 55, pp. 169-170; emphasis added.

372/ European Commission of Human Rights, decision of 5 May 1982, Temeltasch case, Decisions and Reports, April 1983, paras. 74, 75 and 82, pp. 131-132.

> "In order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine *the substantive content*"; 373/
>
> "If the statement displays a clear intent on the part of the State party to exclude or modify the legal effect of a specific provision of a treaty, it must be regarded as a binding reservation, even if the statement is phrased as a declaration. In the present case, the statement entered by the French Government upon accession to the [International] Covenant [on Civil and Political Rights] is clear: it seeks to exclude the application of article 27 to France and emphasizes this exclusion semantically with the words: 'is not applicable'". 374/

(10) More rarely, international courts which have had to rule on problems of this type, to supplement their reasoning, have based themselves on the preparatory work of the unilateral declarations under consideration. In the Belilos case, for example, the European Court of Human Rights, after admitting that "the wording of the original French text" of the Swiss declaration, "though not altogether clear, can be understood as constituting a reservation, 375/ "[l]ike the Commission and the Government, ... recognizes that it is necessary to ascertain the original intention of those who drafted

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373/ European Court of Human Rights, Judgment of 29 April 1988, Belilos case, Publications of the European Court of Human Rights, Series A, vol. 132, para. 42, p. 24. In the same case, the Commission reached a different conclusion, also basing itself "both on the wording of the declaration and on the preparatory work (ibid., para. 41, p. 21); the Commission, more clearly than the Court, gave priority to the terms used in the Swiss declaration (para. 93 of the Commission's report; see the commentary by Iain Cameron and Frank Horn, "Reservations to the European Convention on Human Rights: The Belilos Case", G.Y.B.I.L. 1990, pp. 71-74).

374/ Human Rights Committee, Communication No. 220/1987, decision of 8 November 1989, T.K. v. France, report of the Human Rights Committee, Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40), annex X, para. 8.6, p. 140.

375/ European Court of Human Rights, Judgment of 29 April 1988, Belilos case, Publications of the European Court of Human Rights, Series A, vol. 132, para. 44, para. 49, p. 22.

the declaration" and, in order to do so, takes into account the preparatory work on the declaration, 376/ as the Commission had done in the same case and in the Temeltasch case. 377/

(11) In the Commission's view, some caution is required in this regard. As has been noted, "[s]ince a reservation is a unilateral act by the party making it, evidence from that party's internal sources regarding the preparation of the reservation is admissible to show its intention in making the reservation". 378/ Still, in the everyday life of the law it would appear difficult to recommend that the preparatory work be consulted regularly in order to determine the nature of a unilateral declaration relating to a treaty: it is not always made public, 379/ and in any case it would be difficult to require foreign Governments to consult it.

(12) This is the reason why draft guideline 1.3.1 does not reproduce the text of article 32 of the 1969 and 1986 Vienna Conventions and, without alluding directly to the preparatory work, merely calls for account to be taken of "the intention of the State or the international organization concerned at the time the statement was formulated". This wording draws directly on that used by the International Court of Justice in the Case concerning Fisheries jurisdiction (Spain v. Canada) Jurisdiction of the Court:

> "The Court will ... interpret the relevant words of a declaration, including a reservation contained therein, in a natural and responsible

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376/ Ibid., para. 48, p. 23.

377/ European Commission of Human Rights, decision of 5 May 1982, Temeltasch case, Decisions and Reports, April 1983, paras. 76-80, pp. 131-132.

378/ Sir Robert Jennings and Sir Arthur Watts, Oppenheim's International Law, 9th ed., vol. I, Peace, Longman, London, p. 1242. The authors cite as proof the judgment of the International Court of Justice of 19 December 1978 in the Aegean Sea Continental Shelf case, I.C.J. Reports, 1979, p. 32.

379/ In the Belilos case, the representative of the Swiss Government referred to the internal debates within the Government, but took cover behind their confidential nature (see Iain Cameron and Frank Horn, "Reservations to the European Convention on Human Rights: The Belilos Case", G.Y.B.I.L., 1990, p. 84).

way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court". 380/

(13) Draft guideline 1.3.1 also specifies that, for the purpose of determining the legal nature of a statement formulated in respect of a treaty, it shall be interpreted "in the light of the treaty to which it refers". This constitutes, in the circumstances, the principal element of the "context" mentioned in the general rule of interpretation set out in article 31 of the 1969 and 1986 Vienna Conventions: 381/ whereas a reservation or an interpretive declaration constitutes a unilateral instrument, separate from the treaty to which it relates, it is still closely tied to it and cannot be interpreted in isolation.

(14) The method indicated in draft guideline 1.3.1 can be transposed to the distinction between simple interpretative declarations and conditional interpretative declarations. In this case, too, it is the intention of the State or international organization making the declaration that has to be determined, and this should be done above all by interpreting it in good faith in accordance with the ordinary meaning to be given to its terms.

1.3.2 [1.2.2] Phrasing and name

The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

Commentary

(1) The general rule making it possible to determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration is set out in draft guideline 1.3.1. Draft guidelines 1.3.2 [1.2.2] and 1.3.3 [1.2.3] supplement this general rule by taking into consideration certain specific, frequently encountered situations which may facilitate the determination.

380/ Judgement of 4 December 1998, para. 49.

381/ In this regard, see the above-mentioned advisory opinion of the Inter-American Court of Human Rights, para. 8, note 124.

(2) As made clear by draft guidelines 1.3 and 1.3.2 [1.2.2], it is not the phrasing or name of a unilateral statement formulated in respect of a treaty that determines its legal nature, but the legal effect it purports to produce. In fact, the result of the definition of reservations, given by the Vienna Conventions of 1969, 1978 and 1986 and reproduced in draft guideline 1.1, and of the definition of interpretative declarations found in draft guideline 1.2 is that:

> On the one hand, the character of both is imparted by the objective pursued by the author: excluding or modifying the legal effect of certain provisions of the treaty in their application to its author in the first instance, and specifying or clarifying the meaning attributed by the declarant to the treaty or to certain of its provisions, in the second instance;
>
> And, on the other, the second point that reservations and interpretative declarations have in common has to do with the non-relevance of the phrasing or name given them by the author. 382/

(3) This indifference to the terminology chosen by the State or international organization formulating the statement has been criticized by some authors who believe that it would be appropriate to "take States at their word" and to consider as reservations those unilateral declarations which have been so titled or worded by their authors, and as interpretative declarations those which they have proclaimed to be such. 383/ This position has the dual merit of simplicity (an interpretative declaration is whatever States declare is one) and of conferring "morality" on the practice followed in the matter by

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382/ In both cases, this results from the formulation "however phrased or named".

383/ See, for example, the analysis of the declaration made by France when signing the Treaty of Tlatelolco in 1973 and the analysis thereof by Hector Gros Espiell ("La signature du Traité de Tlatelolco par la Chine et la France", A.F.D.I. 1973, p. 141. However, the author also bases himself on other parameters). This was also the position taken by Japan in 1964 in its observations on the draft articles on the law of treaties adopted by the Commission on first reading (see the commentary to draft guideline 1.2, footnote 52).

preventing States from "playing around" with the names they give to the declarations they make with a view to side-stepping the rules governing reservations or misleading their partners. 384/

(4) In the opinion of the Commission, however, this position runs up against two nullifying objections:

Firstly, it is incompatible with the Vienna definition itself: if a unilateral declaration can be a reservation "however phrased or named", this of necessity means that simple "declarations" (even those expressly qualified as interpretative by their author) may constitute true reservations, but it also and necessarily implies that terminology is not an absolute criterion that can be used in defining interpretative declarations; and

Secondly, it runs counter to the practice of States, jurisprudence and the position of most doctrine. 385/

(5) It must in particular be noted that judges, international arbitrators and bodies monitoring the implementation of human rights treaties refrain from any nominalism and do not stop at the appellation of the unilateral statements accompanying States' consent to be bound, but endeavour to discover the true intention as it emerges from the substance of the declaration, or even the context in which it has been made.

(6) For example, the arbitral tribunal responsible for deciding the Franco-British dispute about the Delimitation of the Continental Shelf in the Mer d'Iroise carefully examined the argument of the United Kingdom that the third French reservation to article 6 of the 1958 Convention on the Continental Shelf was, in reality, a simple interpretative declaration. 386/ Similarly, in the Temeltasch case, the European Commission of Human Rights, relying on article 2, paragraph 1 (d) of the Vienna Convention on the Law of Treaties, agreed

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384/ See the commentary to draft guideline 1.2, para. (5).

385/ See, ibid., paras. 4 to 8.

386/ Decision of 30 June 1977, United Nations, Reports of International Arbitral Awards, vol. XVIII, paras. 54-55, pp. 169-170. See note 371 above.

> "On this point with the majority of legal writers and considers that where a State makes a declaration, presenting it as a condition of its consent to be bound by the Convention and intending it to exclude or alter the legal effect of some of its provisions, such a declaration, *whatever it is called*, must be assimilated to a reservation ..." 387/

This position was also taken by the European Court of Human Rights in the Belilos case: Switzerland accompanied its instrument ratifying the European Convention on Human Rights by a unilateral statement which it entitled "interpretative declaration". The Court nevertheless considered it to be a true reservation.

> "Like the Commission and the Government, the Court recognizes that it is necessary to ascertain the original intention of those who drafted the declaration [...].
>
> "In order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine the substantive content." 388/

The Human Rights Committee took the same line in its decision of 8 November 1989 in the case of T.K. v. France: on the basis of article 2, paragraph 1 (d) of the Vienna Convention on the Law of Treaties, it decided that a communication concerning France's failure to respect article 27 of the International Covenant on Civil and Political Rights was inadmissible because the French Government, on acceding to the Covenant, had declared that "in the light of article 2 of the Constitution of the French Republic, [...] article 27 is not applicable so far as the Republic is concerned". The Committee observed:

> "in this respect that it is not the formal designation but the effect the statement purports to have that determines its nature". 389/

387/ Decision of 5 May 1982, European Commission of Human Rights, Decisions and Reports, February 1983, paras. 69-82, pp. 146-148; emphasis added.

388/ Judgment of 29 April 1988, Publications of the European Court of Human Rights, Series A, vol. 132, paras. 48-49, pp. 23-24.

389/ Communication No. 220/1987, decision adopted on 8 November 1989; Report of the Human Rights Committee to the General Assembly, Official Records, Forty-fifth Session, Supplement No. 40 (A/45/40), United Nations, New York, annex X, para. 8.6, p. 123. See also, to the same effect, the

(7) Nevertheless, this indifference to nominalism is not as radical as it might appear at first sight, since, in the Belilos case, the European Commission of Human Rights had maintained that

> "if a State made both reservations and interpretative declarations at the same time, the latter could only exceptionally be equated with the former". 390/

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decisions M.K. v. France of the same date, communication No. 222/187 (pp. 127-133), and S.G. v. France of 1 November 1991 (No. 347/1988), G.B. v. France of 1 November 1991 (No. 348/1989) and *R.L.M. v. France* of 6 April 1992 (No. 363/1989). Report of the Human Rights Committee to the General Assembly, Official Records, Forty-seventh Session, Supplement No. 40 (A/47/40), United Nations, New York, annex X, pp. 346-371. In an individual opinion which she attached to the decision on T.K. v. France, Mrs. Higgins criticized the Committee's position, pointing out that, in her view:

> "the matter [was not] disposed of by invocation of article 2 (1) (d) of the Vienna Convention on the Law of Treaties, which emphasizes that intent, rather than nomenclature, is the key."
>
> "An examination of the notification of 4 January 1982 shows that the Government of the Republic of France was engaged in two tasks: listing certain reservations and entering certain interpretative declarations. Thus in relation to articles 4 (1), 9, 14 and 19, it uses the phrase 'enters a reservation'. In other paragraphs it declares how terms of the Covenant are in its view to be understood in relation to the French Constitution, French legislation or obligations under the European Convention on Human Rights. To note, by reference to article 2 (1) (d) of the Vienna Convention, that it does not matter how a reservation is phrased or named, cannot serve to turn these interpretative declarations into reservations. Their content is clearly that of declarations. Further, the French notification shows that deliberately different language was selected to serve different legal purposes. There is no reason to suppose that the contrasting use, in different paragraphs, of the phrase 'reservation' and 'declaration' was not entirely deliberate, with its legal consequence well understood by the Government of the Republic." (Official Records, Forty-fifth Session, Supplement No. 40 (A/45/40), United Nations, New York, annex X, appendix II, p. 143).

390/ Cf. the Decision of the Court in this case, 21 May 1988, Publications of the European Court of Human Rights, Series A, vol. 132, para. 41, p. 21. For its part, the Court observed that one of the things that made it difficult to reach a decision in the case was the fact that "the Swiss Government have made both 'reservations' and 'interpretative declarations' in the same instrument of ratification", although the Court did not draw any particular conclusion from that observation (ibid., para. 49, p. 24). See also the individual opinion of Mrs. Higgins in the T.K. v. France case before the Human Rights Committee (see above, footnote 389).

(8) From these observations the following conclusion may be drawn: while the phrasing and name of a unilateral declaration do not constitute part of the definition of an interpretative declaration any more than they do of the definition of a reservation, they nonetheless form an element of appraisal which must be taken into consideration and which can be viewed as being of particular (although not necessarily vital) significance when a State formulates both reservations and interpretative declarations in respect of a single treaty at the same time.

(9) This observation is consistent with the more general doctrinal position that "there is a potential for inequity in this aspect ['however phrased or named'] of the definition": "Under the Vienna Convention, the disadvantages of determining that a statement is a reservation are [...] imposed over the other parties to the treaty. [...] It would be unfortunate in such circumstances if the words "however phrased or named" were given an overriding effect. In exceptional circumstances it might be possible for a party to rely upon an estoppel against a State which attempts to argue that its statement is a reservation. [...] While this is a matter of interpretation rather than the application of equitable principles, it is in keeping with notions of fairness and good faith which underlie the treaty relations of States". 391/

(10) Without reopening the debate on the principle posed by the Vienna Convention with regard to the definition of reservations, a principle which extends to the definition of interpretative declarations, 392/ it would seem legitimate, then, to spell out in the Guide to Practice the extent to which it is possible to remain indifferent to the nominalism implied by the expression "however named or phrased". This is the purpose of draft guideline 1.3.2, which acknowledges that the name a declaring State gives to its declaration is nevertheless an indication of what it is, although it does not constitute an irrebuttable presumption.

391/ D.W. Greig, "Reservations: Equity as a Balancing Factor?". Australian Yearbook of International Law, 1995, pp. 27-28; see also p. 34.

392/ See draft guideline 1.2.

(11) This indication, while still rebuttable, is reinforced when a State simultaneously formulates reservations and interpretative declarations and designates them respectively as such, as the last phrase of draft guideline 1.3.2 emphasizes.

(12) A member of the Commission questioned the validity of the expression "phrasing or name" and proposed that it be replaced by "title or name" or "title or wording". Although aware of the ambiguity of this terminology, the Commission considers it better to keep it, since it is embodied in the Vienna Conventions of 1969, 1978 and 1986.

1.3.3 [1.2.3] Formulation of a unilateral statement when a reservation is prohibited

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author.

Commentary

(1) Draft guideline 1.3.3 [1.2.3] has been worded in the same spirit as the preceding guideline and its purpose is to make it easier to say whether a unilateral statement formulated in respect of a treaty should be classified as a reservation or as an interpretative declaration when the treaty prohibits reservations of a general nature, 393/ or to certain of its provisions. 394/

(2) It seems to the Commission that, in such situations, statements made in respect of provisions to which any reservation is prohibited must be deemed to constitute interpretative declarations. "This would comply with the presumption that a State would intend to perform an act permitted, rather than one prohibited, by a treaty and protect the State from the possibility that

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393/ As, for example, in the case of article 309 of the United Nations Convention on the Law of the Sea.

394/ As, for example, in the case of article 12 of the Geneva Convention on the Continental Shelf which deals with reservations to articles 1 to 3. See the arbitral decision of 30 June 1977, Case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic, United Nations, Reports of International Arbitral Awards, vol. XVIII, paras. 38-39, pp. 161; see also the individual opinion of Herbert W. Briggs, ibid., p. 262.

the impermissible reservation would have the effect of invalidating the entire act of acceptance of the treaty to which the declaration was attached." 395/ In a more general context, this presumption of permissibility is consonant with the "well-established general principle of law that bad faith is not presumed". 396/

(3) It goes without saying, however, that the presumption referred to in draft guideline 1.3.3 [1.2.3] is not irrebuttable and that if the statement actually purports to exclude or modify the legal effect of the provisions of the treaty and not simply to interpret them, then it must be considered to be a reservation and the consequence of article 19 (a) (b) of the Vienna Conventions of 1969 and 1986 is that such a reservation is impermissible and must be treated as such. 397/ This is consistent with the principle of the irrelevance, in principle, of the phrasing or name of unilateral statements formulated in respect of a treaty, as embodied in the definition of reservations and interpretative declarations. 398/

(4) It is apparent from both the title of the draft guideline and its wording that the guideline's purpose is not to determine whether unilateral declarations formulated in the circumstances in question constitute interpretative declarations or unilateral statements other than reservations or interpretative declarations as defined in section 1.4 of the present chapter of the Guide to Practice. Its sole aim is to draw attention to the principle that there can be no presumption that a declaration made in respect of treaty provisions to which a reservation is prohibited is a reservation.

395/ D.W. Greig, "Reservations: Equity as a Balancing Factor?", Australian Yearbook of International Law, 1995, p. 25.

396/ Arbitral decision of 16 November 1957, Lac Lanoux case (France/Spain), United Nations, Reports of International Arbitral Awards, vol. XII, p. 305.

397/ Nevertheless, some members of the Commission reserved their position with regard to this consequence and consider that it is premature to adopt a stance on this point.

398/ See draft guidelines 1.1 and 1.2.

(5) If this is not the case, it is for the interpreter of the declaration in question, which may be either an interpretative declaration or a declaration under section 1.4, to classify it positively on the basis of draft guidelines 1.2 and 1.4.1 [1.1.5] to 1.4.5 [1.2.6].

1.4 Unilateral statements other than reservations and interpretative declarations

Unilateral statements formulated in relation to a treaty which are not reservations or interpretative declarations are outside the scope of the present Guide to Practice.

Commentary

(1) Draft guideline 1.4 may be regarded as a "general exclusionary clause" purporting to limit the scope of the Guide to Practice to reservations, on the one hand, and to interpretative declarations stricto sensu (whether "simple" or "conditional" [399]), to the exclusion of other unilateral statements of any kind which are formulated in relation to a treaty, but which generally do not have as close a relationship with the treaty.

(2) As practice indicates, States and international organizations often take the opportunity, when signing or expressing their final consent to be bound by a treaty, to make statements which relate to the treaty, but do not seek to exclude or modify the legal effect of certain of its provisions (or of the treaty as a whole with respect to certain aspects) in their application to their author, or to interpret the treaty, and which are accordingly neither reservations nor interpretative declarations.

(3) The United Nations publication "Multilateral treaties deposited with the Secretary-General" contains numerous examples of such statements, concerning the legal nature of which the Secretary-General takes no position. [400] Rather he simply notes that they have been made and leaves their legal definition - extremely important, as it determines the legal regime applicable to them - to the user.

(4) This publication reproduces only those unilateral statements which are formulated when signing or expressing final consent to be bound by, ratifying, etc., a treaty deposited with the Secretary-General, but which are

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[399] On this distinction, see draft guideline 1.2.1 [1.2.4].

[400] As attested by the wording of the heading introducing these instruments: "Declarations [no other indication] and Reservations".

in fact neither reservations nor interpretative declarations. This is obviously because these are the only statements communicated to the Secretary-General, but there is no doubt that this fact is of major practical importance: statements made in the above circumstances raise the most problems as far as distinguishing them from reservations or conditional interpretative declarations is concerned, as, by definition, they may be formulated only "when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty. 401/

(5) However, although it is true that in practice most of these statements are made at the time of signature or of expression of consent to be bound by the treaty, it is nevertheless possible for them to be made at a different time, even after the entry into force of the treaty for their author. 402/ However, it would not be useful for the Commission to take a firm position on this point, as the purpose of draft guideline 1.4 is precisely to exclude such statements from the scope of the Guide to Practice.

(6) Similarly, and for the same reason, although it might seem prima facie that such unilateral statements fall within the general category of unilateral acts of States, which the Commission is also currently studying, 403/ the Commission does not intend to take any decision regarding the legal regime applicable to them. It has simply endeavoured, in each of the draft guidelines in this section of the Guide to Practice, to provide, in as legally neutral a manner as possible, a definition of these different categories of unilateral statement which is sufficient to help distinguish them from reservations and interpretative declarations.

(7) Unilateral statements formulated by States or international organizations in respect of or in relation to a treaty are so numerous and so

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401/ See draft guidelines 1.1 and 1.2.1 [1.2.4]. On the other hand, "simple" interpretative declarations may, in the Commission's opinion, be formulated at any time; see draft guideline 1.2 and paragraphs (21) to (32) of the commentary thereto.

402/ See, for example, paragraph (8) of the commentary to draft guideline 1.4.4 [1.2.5]; but the same remark might undoubtedly be made about other draft guidelines in this section of the Guide to Practice.

403/ Some members of the Commission have taken a firm position to this effect, while others have been more cautious.

diverse that it is probably futile to try to make an exhaustive listing of them, and this section of the Guide to Practice does not attempt to do so. It simply tries to present the main categories of such statements which might be confused with reservations or interpretative declarations. 404/ The classification contained in the draft guidelines below is, accordingly, merely illustrative.

1.4.1 [1.1.5] Statements purporting to undertake unilateral commitments

A unilateral statement formulated by a State or an international organization in relation to a treaty, whereby its author purports to undertake obligations going beyond those imposed on it by the treaty constitutes a unilateral commitment which is outside the scope of the present Guide to Practice.

Commentary

(1) A well-known example of an "extensive" 405/ reservation which was given by Brierly in his first report on the law of treaties, is provided by the statement which South Africa made when it signed the General Agreement on Tariffs and Trade (GATT) in 1948: "As the article reserved against stipulates that the agreement 'shall not apply' as between parties which have not concluded tariff negotiations with each other and which do not consent to its application, the effect of the reservation is to enlarge rather than restrict the obligations of South Africa". 406/ Manfred Lachs also relied on that example in asserting the existence of cases "where a reservation, instead of restricting, extended the obligations assumed by the party" in question. 407/

404/ The Commission will complete its presentation of these categories of unilateral statement made in relation to a treaty when it concludes its consideration of the Special Rapporteur's fourth report, at which time it will need to take a decision on the legal nature of unilateral statements relating to the implementation of a treaty at the international level.

405/ On this controversial concept, see above, paragraphs 4 et seq. of the commentary to draft guideline 1.1.5 [1.1.6].

406/ ILC, Yearbook ... 1950, vol. II, p. 239.

407/ ILC, Yearbook ... 1962, vol. I, 651st meeting, 25 May 1962, p. 142.

(2) The South African statement gave rise to considerable controversy, 408/ but can hardly be regarded as a reservation, if analysed against the definition of reservations given in the 1969, 1978 and 1986 Vienna Conventions: this kind of statement cannot have the effect of modifying the legal effect of the treaty or of some of its provisions: they are undertakings which, though admittedly entered into at the time of expression of consent to be bound by the treaty, have no effect on that treaty, and could have been formulated at any time without resulting in a modification of their legal effects. In other words, it may be considered that, 409/ whereas reservations are "non-autonomous unilateral acts", 410/ such statements impose autonomous obligations on their authors and constitute unilateral legal acts which are subject to the legal rules applicable to that type of instrument, 411/ and not to the regime of reservations.

(3) Obviously, it does not follow from this finding that such statements cannot be made. In accordance with the well-known dictum of the International Court of Justice:

> "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating

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408/ James Brierly, in keeping with his general definition of reservations, regarded it as a "proposal of reservation", since it involved an "offer" made to the other parties which they had to accept for it to become a valid reservation (ILC, Yearbook ... 1950, vol. II, p. 239); Lachs regarded it purely and simply as an example of an extensive reservation (ILC, Yearbook ... 1962, vol. I, 651st meeting, 25 May 1962, p. 142); Mr. Horn saw it as a mere declaration of intent without any legal significance (Frank Horn, Reservations and Interpretative Declarations to Multilateral Treaties, op. cit. (note 266 above), p. 89); and Professor Imbert considered that "the statement of the South African Union could only have the effect of increasing the obligations of that State. Accordingly, it did not constitute a reservation, which would necessarily restrict the obligations under the treaty" (Les réserves aux traités multilatéraux, op. cit. (note 252 above), p. 15).

409/ Some members of the Commission do not consider this to be an inevitable conclusion.

410/ On this concept, see Patrick Daillier and Alain Pellet, Droit international public (Nguyen Quoc Dinh), Paris, L.G.D.J., 6th ed., 1999, pp. 358-361.

411/ In this connection, see J.M. Ruda, "Reservations to treaties", Recueil des cours ... 1975-III, vol. 146, p. 147.

> legal obligations. ... When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations is binding." 412/

(4) But these statements are not reservations in that they are independent of the instrument constituted by the treaty, particularly because they can undoubtedly be formulated at any time, although the risk of confusing them with reservations arises only when they are formulated at the moment of the expression of the consent to be bound.

(5) The Commission did not wish to raise the question of the legal regime applicable to statements of this type, which does not come within the purview of "reservations to treaties". 413/ However, as in the case of the statements covered in the following draft guidelines (1.4.2 [1.1.6] to 1.4.5 [1.2.6]), it deemed it useful to go beyond a mere negative observation that they are neither reservations or interpretative declarations. Defining them as "unilateral commitments", an expression which is deliberately rather neutral from the legal point of view and which should be read in conjunction with the phrase "purports to undertake obligations", is an attempt to suggest such a positive definition.

(6) This qualification is sufficient to distinguish them from certain statements whereby States reserve the right to apply their national law on the ground that it goes further than the obligations under the treaty. 414/ In doing so, the author of the declaration claims to be making a mere

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412/ Judgment of 20 December 1974, Nuclear Tests case, I.C.J. Reports, 1974, p. 267.

413/ See draft guideline 1.4 and the commentary thereto.

414/ For example, when ratifying the Convention of 13 July 1931 for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, Thailand pointed out that, "as its narcotic drugs law goes beyond the provisions of the Geneva Convention and the present Convention on certain points, the Thai Government reserves the right to apply its existing law" (Multilateral Treaties Deposited with the Secretary-General - status as at 31 December 1997, United Nations, New York, 1998, Sales No. E.98.V.2, chap. VI.8, p. 275; in the same connection see the declaration by Mexico, ibid.).

observation; if accurate, it is an item of information having no particular legal scope; if not, the declaration may be treated as a reservation; 415/ but, in any event, it does not give rise to rights for the other States parties. 416/

1.4.2 [1.1.6] Unilateral statements purporting to add further elements to a treaty

A unilateral statement whereby a State or an international organization purports to add further elements to a treaty constitutes a proposal to modify the content of the treaty which is outside the scope of the present Guide to Practice.

Commentary

(1) The Commission considers it self-evident that a State or an international organization cannot, by a unilateral statement, impose on the other contracting parties to a treaty any obligations which do not arise either under the treaty or under general international law. 417/ In other words, when a State or an international organization formulates a reservation, it may seek to increase its rights under the treaty and/or diminish those of its partners under the treaty, but it cannot "legislate" via reservations and the Vienna definition of reservations followed in draft guideline 1.1 precludes this risk by stipulating that the author of the reservation must seek "to exclude or to modify the legal effect of certain provisions of the treaty" and not "of certain rules of general international law".

(2) On the other hand, there is nothing to prevent a party to a treaty from proposing an extension of the scope or purpose of the treaty to its partners. In the Commission's view, this is how the statement whereby the Government of Israel made known its wish to add the Shield of David to the Red Cross emblems

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415/ Whose permissibility is no doubt open to question.

416/ See in this connection the explanations given by F. Horn (Reservations and Interpretative Declarations to Multilateral Treaties, op. cit. (note 266 above), p. 89) on comparable reservations to the 1931 Drugs Convention.

417/ A reservation may have the effect of limiting the rights of the other contracting parties under the treaty and of "returning" them to the situation (and obligations) arising under general international law (on this point, see paras. (5) and (10) of the commentary to draft guideline 1.1.5 [1.1.6]).

recognized by the Geneva Conventions of 1949 may be seen. 418/ Such a statement actually seeks not to exclude or modify the effect of the provisions of the treaties in question (which in fact remain unchanged), but to add a provision to those treaties.

(3) This is the case covered by draft guideline 1.4.2 [1.1.6]. While relatively uncommon, it does nevertheless occur. Apart from the example of the statement by Israel concerning the Shield of David, 419/ one can think of cases of unilateral statements which are submitted as reservations, but which, instead of limiting themselves to excluding (negatively) the legal effect of certain treaty provisions, actually seek to increase (positively) the obligations of other contracting parties as compared with those which arise for them under general international law. 420/

(4) Since they are neither reservations nor interpretative declarations within the meaning of the present Guide to Practice, such unilateral statements fall outside its scope 421/ and the Commission does not intend to take a position either on their permissibility or on their legal regime.

1.4.3 [1.1.7] Statements of non-recognition

A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize constitutes a statement of non-recognition which is outside

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418/ Legal scholars are divided on this point. Compare Jean Pictet, Les Conventions de Genève du 12 août 1949 - Commentaire, ICRC, Geneva, vol. I, pp. 330-341, or Frank Horn, Reservations and Interpretative Declarations to Multilateral Treaties, op. cit (note 266 above) pp. 82-83 (who doubt whether it is a reservation), and Shabtai Rosenne, "The Red Cross, Red Crescent, Red Lion and Sun and the Red Shield of David", Israel Yearbook on Human Rights, 1975, pp. 9-54, or Pierre-Henri Imbert, Les réserves aux traités multilatéraux, op. cit. (note 252 above), pp. 361-362 (who take the contrary view).

419/ Turkey had proceeded in the same way to have the Red Crescent accepted among the Red Cross emblems under The Hague Conventions.

420/ This would be the case with the "reservations" of the socialist countries to article 9 of the 1958 Convention on the High Seas mentioned in the commentary to draft guideline 1.1.5 [1.1.6] (paras. (9) and (10) and note 275), considering that the scope given by those countries to State vessels on the high seas went further than that recognized by the applicable customary rules.

421/ See draft guideline 1.4 and the commentary thereto.

the scope of the present Guide to Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

Commentary

(1) States frequently accompany the expression of their consent to be bound by a treaty with a statement in which they indicate that such consent does not imply recognition of one or more of the other contracting parties or, in a more limited way, of certain situations, generally territorial, relating to one or more of the other parties. Such statements are often called "reservations relating to non-recognition"; this is a convenient but misleading heading that covers some very diverse situations.

(2) The term in fact applies to two types of statements which have the common feature of specifying that the State formulating them does not recognize another entity that is (or wishes to become) a party to the treaty, but which seek to produce very different legal effects: in some cases, the author of the statement is simply taking a "precautionary step" by pointing out, in accordance with a well-established practice, that its participation in a treaty to which an entity that it does not recognize as a State is a party does not amount to recognition; in other cases, the State making the statement expressly excludes the application of the treaty between itself and the non-recognized entity.

(3) In this regard, we may, for example, compare the reactions of Australia and Germany to the accession of certain States to the 1949 Geneva Conventions. While repeating its non-recognition of the German Democratic Republic, the Democratic People's Republic of Korea, Viet Nam and the People's Republic of China, Australia nevertheless "notes their acceptance of the provisions of

the Conventions and their intention to apply the said provisions". 422/ Germany, however, excludes any treaty relations with South Viet Nam:

> "... the Federal Government does not recognize the Provisional Revolutionary Government as a body empowered to represent a State and [...] accordingly is not able to consider the Provisional Revolutionary Government as a Party to the Geneva Conventions of 12 August 1949". 423/

(4) In the first case, there can be no doubt that the statements in question are not reservations. 424/ They add nothing to existing law, since it is generally accepted that participation in the same multilateral treaty does not

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422/ See International Committee of the Red Cross (ICRC), Geneva Conventions of 12 August 1949 for the Protection of War Victims - Reservations, declarations and communications made at the time of or in connection with ratification, accession or succession (DOM/JUR/91/1719-CRV/1), p. 13; see also, for example, the statement of the Syrian Arab Republic at the time of signature of the Agreement establishing the International Fund for Agricultural Development (IFAD): "It is understood that the ratification of this Agreement by the Syrian Arab Republic does not mean in any way recognition of Israel by the Syrian Arab Republic" (Multilateral Treaties ..., chap. X.8, p. 415) or the Syrian Arab Republic's first, albeit slightly more ambiguous, statement in respect of the Vienna Convention on Diplomatic Relations (ibid., chap. III.3, p. 58): "The Syrian Arab Republic does not recognize Israel and will not enter into dealings with it". The statement made by Argentina on acceding to the Convention relating to the Status of Stateless Persons of 28 September 1954 is not in the least ambiguous: "The application of this Convention in territories whose sovereignty is the subject of discussion between two or more States, irrespective of whether they are parties to the Convention, cannot be construed as an alteration, renunciation or relinquishment of the position previously maintained by each of them" (ibid., chap. V.3, p. 248); this is an example of non-recognition of a situation (see also Spain's statements concerning the 1958 Geneva Conventions on the Law of the Sea in respect of Gibraltar, ibid., chaps. XXI.1, p. 783, XXI.2, p. 789, XXI.3, p. 793 and XXI.4, p. 795).

423/ ICRC document DOM/JUR/91/1719-CRV/1, p. 6. See also the statement by the Kingdom of Saudi Arabia on signing the Agreement establishing IFAD: "The participation of the Kingdom of Saudi Arabia in the Agreement shall in no way imply recognition of Israel and shall not lead to entry into dealings with Israel under this Agreement" (Multilateral Treaties ..., chap. X.8, p. 403; see also the statements of Iraq and Kuwait, couched in similar terms, ibid., pp. 414-415.

424/ They may be seen as general statements of policy within the meaning of draft guideline 1.4.4 [1.2.5]. In the Commission's view, draft guideline 1.4.3 [1.1.7] is rendered no less indispensable by the existence of the other category of statements of non-recognition: those whereby the declaring State seeks to exclude the application of the treaty as a whole in its relations with the non-recognized entity.

signify mutual recognition, even implicit. 425/ Even if that were not the case, 426/ it would still not mean that the statements were reservations: these unilateral statements do not purport to have an effect on the treaty or its provisions.

(5) Categorizing a unilateral statement whereby a State expressly excludes the application of the treaty between itself and the entity it does not recognize is an infinitely more delicate matter. Unlike "precautionary" statements, a statement of this type clearly seeks to have (and does have) a legal effect on the application of the treaty, which is entirely excluded, but only in the relations between the declaring State and the non-recognized entity. Now, the definition of reservations does not preclude a reservation from having an effect *ratione personae* 427/ and, moreover, in accordance with the provisions of article 20, paragraph 4 (b), of the Vienna Convention of 1969, through an objection, accompanied by a clearly worded refusal to be bound by the treaty with respect to the reserving State, an objecting State can prevent the entry into force of the treaty as between itself and the reserving State; there seems to be no *prima facie* reason why this could not be accomplished through a reservation as well.

(6) However, according to most legal writers, "[i]t is questionable whether a statement on this subject, even when designated as a reservation,

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425/ See J. Verhoeven, *La reconnaissance internationale dans la pratique contemporaine*, Paris, Pédone, 1975, pp. 429-431. Kuwait clearly reaffirms this in the statement which it made on acceding to the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid: "It is understood that the accession of the State of Kuwait to the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the United Nations General Assembly [on 30 November 1973], does not mean in any way recognition of Israel by the State of Kuwait" (*Multilateral Treaties ...*, chap. IV.7, p. 168).

426/ That is, if participation in the same multilateral treaty did imply mutual recognition.

427/ See, however, Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, op. cit. (note 266 above), p. 109.

constitutes a reservation as generally understood since it does not purport, in the usual circumstances, to amend or modify any substantive provision of the treaty". 428/

(7) Although some members of the Commission were of the contrary view, there are several reasons for not categorizing a statement of non-recognition as a reservation, even if it purports to exclude the application of the treaty in the relations between the State formulating it and the non-recognized entity. These reasons, in the opinion of most members of the Commission, are both practical and theoretical.

(8) In practice, it seems to be actually very difficult, if not impossible, to apply the reservations regime to statements of non-recognition:

Objections to such statements are hardly likely to be made and would, in any event, be incapable of having any real effect;

It would hardly be reasonable to conclude that such statements are prohibited under article 19 (a) and (b) of the 1969 and 1986 Conventions if the treaty in question prohibits, or permits only certain types of, reservations; and

It must be acknowledged that recognizing them as reservations would hardly be compatible with the letter of the Vienna definition since the cases in which such statements may be made cannot be limited to those covered by article 2, paragraph 1 (d), of the 1969 Convention. 429/

428/ Marjorie M. Whiteman, Digest of International Law, vol. 14, 1970, p. 158; it should be recalled that, according to the definition given by draft guideline 1.1, a reservation purports to modify not the provisions of the treaty, but their effects. Also see, in particular, B.R. Bot, Non-Recognition and Treaty Relations, Leyden, Sijthoff, 1968, pp. 30-31, 132-139 and 252-254; M. Lachs, "Recognition and Modern Methods of International Cooperation", British Yearbook of International Law 1959, pp. 252-259; H. Lauterpacht, Recognition in International Law, Cambridge, Cambridge University Press, 1947, pp. 369-374 or J. Verhoeven, La reconnaissance internationale dans la pratique contemporaine, op. cit. (note 425 above), pp. 428-448.

429/ This latter argument, however, is not conclusive since, as shown by draft guideline 1.1.2 adopted by the Commission (see also the commentary to this provision in the report of the Commission on the work of its fiftieth session, A/53/10, para. 540) and the discussion on reservations made at the time of State succession (see ibid., para. 224), the list of cases where a reservation may be made that appears in article 2, paragraph 1 (d), of the Vienna Convention is not exhaustive.

(9) Moreover, from a more theoretical point of view, statements of this kind, unlike reservations, do not concern the legal effect of the treaty itself or its provisions, but rather the capacity of the non-recognized entity to be bound by the treaty. 430/

(10) Such statements are also not interpretative declarations since their aim is not to *interpret* the treaty, but to exclude its application in the relations between two parties thereto.

(11) The Commission intentionally avoided to specify the nature of the non-recognized entity. Be it a State, a Government or any other entity (for example a national liberation movement), the problem is posed in identical terms. Mutatis mutandis, the same is true regarding statements of non-recognition of certain situations (notably territorial ones). In particular, in all these cases, we find each of the two categories of statements of non-recognition referred to above: 431/ "precautionary statements" 432/ and "statements of exclusion". 433/

(12) The problem appears to be a very marginal one insofar as international organizations are concerned; it could, however, arise in the case of some

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430/ See Joe Verhoeven, La reconnaissance internationale dans la pratique contemporaine, op. cit. (note 425 above), p. 431, footnote 284.

431/ See paragraphs (2) and (3) above.

432/ Cf. the statement by Cameroon concerning the Partial Nuclear Test-Ban Treaty of 5 August 1963: "Under no circumstances could the signing by the Federal Republic of Cameroon have the effect of entailing recognition by Cameroon of Governments or regimes which, prior to such signing, had not yet been recognized by the Federal Republic of Cameroon according to the normal traditional procedures established by international law". Similarly, see the statement by Benin in connection with the same treaty (Status of Multilateral Arms Regulation and Disarmament Agreements, Fifth Edition, 1996 (United Nations publication, Sales No. E.97.IX.3, p. 40)) or the one by the Republic of Korea when it signed the Convention on Biological Weapons (ibid., p. 176).

433/ Cf. the statement by the United States concerning its participation in the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, signed in Geneva on 13 July 1931, which "does not involve any contractual obligation on the part of the United States of America to a country represented by a regime or entity which the Government of the United States of America does not recognize as the government of that country until such country has a Government recognized by the Government of the United States of America" (Multilateral Treaties ..., chap. VI.8, p. 274).

international integration organizations such as the European Union. In that event, there would be no reason not to extend the solution adopted for statements by States, mutatis mutandis, to statements which international organizations might be required to formulate. The Commission nevertheless feels that this possibility is too hypothetical at present to warrant making reference to it in the body of the Guide to Practice.

(13) In adopting draft guideline 1.4.3 [1.1.7], the Commission was guided by the fundamental consideration that the central problem here is that of non-recognition and that it is peripheral to the right to enter reservations. The Commission felt that it was essential to mention this particular category of statements, which play a major role in contemporary international relations; but, as for all unilateral statements which are neither reservations nor interpretative declarations, it focused on what it saw as strictly necessary to make a distinction between them and it has refrained from "spilling over" into issues relating to the recognition of States in general and the effects of non-recognition.

1.4.4 [1.2.5] General statements of policy

A unilateral statement formulated by a State or by an international organization whereby that State or that organization expresses its views on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, constitutes a general statement of policy which is outside the scope of the present Guide to Practice.

Commentary

(1) It frequently happens that, on the occasion of the signing of a treaty or the expression of its definitive consent to be bound, a State expresses its opinion, positive or negative, with regard to the treaty and even sets forth improvements that it feels ought to be made, as well as ways of making them, without purporting to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application between it and the other contracting parties, or to interpret it. Hence, these are neither reservations nor interpretative declarations, but simple general statements of policy formulated in relation to the treaty or relating to the area which it covers.

(2) Declarations by several States regarding the Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons afford some notable examples. 434/ These are simple

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434/ This is the case, for example, with the declarations formulated by China ("1. The Government of the People's Republic of China has decided to sign the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects adopted at the United Nations Conference held in Geneva on 10 October 1980. 2. The Government of the People's Republic of China deems that the basic spirit of the Convention reflects the reasonable demand and good intention of numerous countries and peoples of the world regarding prohibitions or restrictions on the use of certain conventional weapons which are excessively injurious or have indiscriminate effects. This basic spirit conforms to China's consistent position and serves the interest of opposing aggression and maintaining peace. 3. However, it should be pointed out that the Convention fails to provide for supervision or verification of any violation of its clauses, thus weakening its binding force. The Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices fails to lay down strict restrictions on the use of such weapons by the aggressor on the territory of his victim and to provide adequately for the right of a State victim of an aggression to defend itself by all necessary means. The Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons does not stipulate restrictions on the use of such weapons against combat personnel. Furthermore, the Chinese texts of the Convention and Protocol are not accurate or satisfactory enough. It is the hope of the Chinese Government that these inadequacies can be remedied in due course.") or by France ("After signing the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed Excessively Injurious or to Have Indiscriminate Effects, the French Government, as it has already had occasion to state, through its representative to the United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons in Geneva, during the discussion of the proposal concerning verification arrangements submitted by the delegation of the Federal Republic of Germany and of which the French Government became a sponsor, and at the final meeting on 10 October 1980; on 20 November 1980 through the representative of the Netherlands, speaking on behalf of the nine States members of the European Community in the First Committee of the thirty-fifth session of the United Nations General Assembly; regrets that thus far it has not been possible for the States which participated in the negotiation of the Convention to reach agreement on the provisions concerning the verification of facts which might be alleged and which might constitute violations of the undertakings subscribed to. It therefore reserves the right to submit, possibly in association with other States, proposals aimed at filling the gap at the first conference to be held pursuant to article 8 of the Convention and to utilize, as appropriate, procedures that would make it possible to bring before the international community facts and information which, if verified, could constitute violations of the provisions of the Convention and the Protocols annexed thereto.") (Multilateral Treaties ..., chap. XXVI.2, p. 883 and pp. 883-884; see also the declarations made by the United States (ibid., p. 886), by Italy observations regarding the treaty which reaffirm or supplement some of the positions taken during its negotiation, but which have no effect on its application. 435/

(3) This is also the case when a State makes a declaration in which it calls on all or some other States to become parties to a treaty 436/ or to implement it effectively. 437/

(4) The same is true when a State takes the opportunity afforded by its signature of a treaty or its expression of consent to be bound by it to recall certain aspects of its policy with regard to the subject area of the treaty, as China did when it signed the Comprehensive Test-Ban Treaty adopted by the

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(ibid., pp. 884-885) and by Romania (ibid., p. 885).

435/ See also, for example, the long declaration made by the Holy See in 1985 when ratifying the two Additional Protocols of 1977 to the Geneva Conventions of 1949 (text attached to the reply from the Holy See to the questionnaire on reservations to treaties).

436/ See the declaration by the United States of America concerning the above-mentioned Convention of 10 October 1980: "The United States Government welcomes the adoption of this Convention, and hopes that all States will give the most serious consideration to ratification or accession" (Multilateral Treaties ..., chap. XXVI.2, p. 886) or the one by Japan concerning the NTP: "The Government of Japan hopes that as many States as possible, whether possessing a nuclear explosive capability or not, will become parties to this Treaty in order to make it truly effective. In particular, it strongly hopes that the Republic of France and the People's Republic of China, which possess nuclear weapons but are not parties to this Treaty, will accede thereto" (United Nations, Treaty Series, vol. 1035, pp. 342-343).

437/ See the declaration by China concerning the Paris Convention of 13 January 1993 on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons: "III. States Parties that have abandoned chemical weapons on the territories of other States Parties should implement in earnest the relevant provisions of the Convention and undertake the obligation to destroy the abandoned chemical weapons" (Multilateral Treaties ..., chap. XXVI.3, pp. 890-891).

General Assembly of the United Nations on 10 September 1996 [438] or the Holy See when it became a party to the Convention on the Rights of the Child. [439]

(5) In the same spirit, some declarations made in the instruments of ratification of the 1971 Seabed Treaty, notably those of Canada and India, concerning types of weapons other than nuclear weapons, do not purport to modify the rights and obligations ensuing from the Treaty or to interpret it; as was noted, "Their main purpose is to avoid that the Treaty prejudice the positions of States making a declaration with respect to certain issues of the law of the sea on which States have different positions and views". [440]

(6) What these diverse declarations have in common is that the treaty in respect of which they are made is simply a pretext, and they bear no legal relationship to it: they could have been made under any circumstances, they have no effect on its implementation, nor do they seek to. They are thus neither reservations nor interpretative declarations. What is more, in the view of most of the members of the Commission, they are not even governed by the law of treaties, which in turn offers no help in assessing their validity (which is dependent on other rules of international law, both general and specialized), and this justifies that, like the other categories of unilateral declarations defined in section 1.4 of the Guide to Practice, they are excluded from the latter's scope.

(7) Although there does not seem to be any example of declarations of this type being formulated by an international organization, there is nothing to prevent that situation from changing in the future and there is no reason for

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[438] "1. China has all along stood for the complete prohibition and thorough destruction of nuclear weapons and the realization of a nuclear-weapon-free world ..." (ibid., chap. XXVI.4, p. 895).

[439] "By acceding to the Convention on the Rights of the Child, the Holy See intends to give renewed expression to its constant concern for the well-being of children and families ..." (ibid., chap. IV.11, p. 214); see also the aforementioned declaration (note 435) by the Holy See on the subject of the 1977 Protocols additional to the 1949 Geneva Conventions: "Finally, the Holy See reasserts, on this occasion, its strong conviction as to the fundamentally inhumane nature of war ...".

[440] Luigi Migliorino, "Declarations and Reservations to the 1971 Seabed Treaty", I.Y.B.I.L. 1985, p. 107; see also p. 115 ff. and p. 119.

it not to. It therefore seems warranted not to exclude this possibility by elaborating a draft guideline 1.4.4 [1.2.5] that is confined solely to States.

(8) Likewise, although it is clear that the risks of confusion between the unilateral declarations covered by this draft and reservations and interpretative declarations cannot arise unless they are formulated on the occasion of the signing of or the expression of consent to be bound by the treaty, general statements of policy may be made at any time, even when they express the views of their author on the subject of the treaty or the area covered by it. It therefore does not seem desirable to introduce a temporal element in their definition.

(9) Lastly, it should be stressed that these declarations differ from other categories of unilateral declarations referred to in section 1.4 in that, unlike those relating to draft guidelines 1.4.1 [1.1.5], 1.4.2 [1.1.6] and 1.4.3 [1.1.7], they do not purport to produce a legal effect on the treaty or its implementation. Nevertheless, in contrast with declarations relating to the implementation of the treaty at the internal level, defined by draft guideline 1.4.5 [1.2.6], they are addressed to the other contracting parties or, more generally, are clearly situated at the international level.

1.4.5 [1.2.6] Statements concerning modalities of implementation of a treaty at the internal level

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without purporting as such to affect its rights and obligations towards the other contracting parties, constitutes an informative statement which is outside the scope of the present Guide to Practice.

Commentary

(1) A somewhat different situation from those described in draft guideline 1.4.4 [1.2.5] above relates to what one might call "informative declarations", whereby the formulating State informs its partners, for example, of the internal authorities that will be responsible for implementing the treaty, regardless of how it will discharge its obligations or how it will exercise its rights under the treaty.

(2) The practice of this type of unilateral declaration seems particularly developed in the United States, where three categories have been noted: "Statements initiated by the Senate may authorize the President to issue more

concrete instructions for the implementation of the treaty obligations on the internal level or by means of agreements of a special kind with the other parties or they may let certain measures of implementation pend later authorization by Congress". 441/

(3) Thus, authorization to ratify the Statute of the International Atomic Energy Agency (IAEA) was given by the United States Senate,

> "subject to the interpretation and understanding which is hereby made a part and condition of the resolution of ratification, that (1) any amendment to the Statute shall be submitted to the Senate for its advice and consent, as in the case of the Statute itself, and (2) the United States will not remain a member of the Agency in the event of an amendment to the Statute being adopted to which the Senate by a formal vote shall refuse its advice and consent". 442/

(4) This declaration was attached to the United States instrument of ratification (the State party called it an "interpretation and understanding"), with the following explanation:

> "The Government of the United States of America considers that the above statement of interpretation and understanding pertains only to United States constitutional procedures and is of a purely domestic character". 443/

(5) As widespread as this practice is on the part of the United States, the latter is not the only country to use it. For example, in ratifying the United Nations Convention on the Law of the Sea, Greece declared that it:

> "secures all the rights and assumes all the obligations deriving from the Convention" and that

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441/ Frank Horn, Reservations and Interpretative Declarations to Multilateral Treaties, op. cit. (note 266 above), p. 102.

442/ Text in Marjorie M. Whiteman, Digest of International Law, vol. 14, 1970, p. 191; see also the "interpretation and explanation" attached to the instrument of ratification of the Convention establishing the Organization for Economic Cooperation and Development (OECD) (ibid., p. 192).

443/ Ibid., pp. 191-192.

> "[It] shall determine when and how it shall exercise these rights, according to its national strategy. This shall not imply that Greece renounces these rights in any way". 444/

(6) Occasionally, however, the distinction between an informative declaration and an interpretative declaration may be unclear, as Sweden notes in its reply to the Commission's questionnaire on reservations: 445/ "It should be noted that some of the declarations referred to include purely informative as well as interpretative elements. Only the latter are being dealt with here, although the distinction may sometimes be vague". By way of example, Sweden, explaining the reasons for the declaration attached to its instrument of ratification of the 1980 European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities, stated: "The reason for the declaration [...] was not only to provide information on which Swedish authorities and bodies would fall within the scope of the Convention, but also to convey that its application would be confined to those indicated; e.g. to exclude other bodies such as parishes which under Swedish law are local public entities". Here one can probably say that this is really a reservation by means of which the author seeks to exclude the application of the treaty to certain types of institution to which it might otherwise apply. At the very least, it might be a true interpretative declaration explaining how Sweden understands the treaty.

(7) But this is not the case with purely informative declarations, which, like those of the United States cited earlier, 446/ cannot have any international effect and concern only relations between Congress and the President. The problem arose in connection with a declaration of this type made by the United States in respect of a treaty concluded with Canada in 1950 on the subject of the Niagara River. The Senate would only authorize ratification through a "reservation" that specifically identified the

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444/ Multilateral Treaties Deposited with the Secretary-General - status as at 31 December 1997, United Nations, New York, 1998, Sales No. E.98.V.2, chap. XXI.6, p. 811.

445/ Reply to question 3.1.

446/ Paragraphs (2) to (6).

competent national authorities for the American side; 447/ this reservation was transmitted to Canada, which accepted it, stating that it did so "because its provisions relate only to the internal application of the treaty within the United States and do not affect Canada's rights or obligations under the treaty". 448/ Following an internal dispute, the District of Columbia Court of Appeal ruled, in a judgement dated 20 June 1957, that the "reservation" had not modified the treaty in any way and that, since it related only to the expression of purely domestic concerns, it did not constitute a true reservation in the sense of international law. 449/ This reasoning is further upheld 450/ by the fact that the declaration did not purport to produce any effect at the international level.

(8) For the same reasons, it would be difficult to call such a unilateral declaration "an interpretative declaration": it does not interpret one or more of the provisions of the treaty, but is directed only at the internal modalities of its implementation. It can also be seen from United States practice that such declarations are not systematically attached to the instrument by which the country expresses its consent to be bound by a treaty, 451/ and this clearly demonstrates that they are exclusively domestic in scope.

447/ This famous declaration is known as the "Niagara reservation"; see Louis Henkin, "The Treaty Makers and the Law Makers: The Niagara reservation", Columbia Law Review 1956, pp. 1151-1182.

448/ Quoted by Marjorie M. Whiteman, op. cit. (note 442 above), p. 168.

449/ Power of Authority of the State of New York v. Federal Power Commission, 247 F.2d 538-544 (D.C. Cir, 1957); for a fuller account of the case, see Marjorie M. Whiteman, op. cit., pp. 165-169; William W. Bishop, Jr., "Reservations to treaties", op. cit., pp. 317-322; or Frank Horn, op. cit., pp. 107-108.

450/ The fact that the "Niagara reservation" was formulated in the context of a bilateral treaty does not weaken this reasoning; quite the contrary: while a "reservation" to a bilateral treaty can be viewed as an offer to renegotiate (see draft guideline 1.5.1), which, in this case, Canada accepted, it is quite significant that the Court of Appeals held that it had no international scope. It would in fact be difficult to see how Canada could have "objected" to a declaration that did not concern it.

451/ See David Hunter Miller, Reservations to Treaties - Their Effect and the Procedure in Regard Thereto, Washington, 1919, pp. 170-171, or Marjorie M. Whiteman, op. cit. (note 442 above), pp. 186ff.

(9) Accordingly, it would appear that declarations which simply give indications of the manner in which the State which formulates them will implement the treaty at the internal level are not interpretative declarations, even though, unlike the declarations covered by draft guideline 1.4.4 [1.2.5], they are directly linked to the treaty.

(10) The above comments may also apply to certain unilateral declarations formulated by an international organization in relation to a treaty. Thus, the European Community made the following declaration when signing the Convention of 25 February 1991 on Environmental Impact Assessment in a Transboundary Context: "It is understood that the Community Member States, in their mutual relations, will apply the Convention in accordance with the Community's internal rules, including those of the EURATOM Treaty, and without prejudice to appropriate amendments being made to those rules". 452/

(11) The Commission considers that the expression "at the internal level" is not excessive as regards unilateral declarations of this type formulated by international organizations, there no longer being any doubt as to the existence of an "internal" law peculiar to each international organization. 453/

(12) The expression "as such" inserted in draft guideline 1.4.5 [1.2.6] is intended to draw attention to the fact that States and international organizations which formulate unilateral declarations do not have the objective of affecting the rights and obligations of the declarant in relation to the other contracting parties, but that it cannot be excluded that those declarations may have such effects, in particular through estoppel or, more generally, owing to the application of the principle of good faith. Moreover,

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452/ See Multilateral Treaties ..., chap. XXVII.4, p. 927. See also similar declarations of the European Community in respect of the 1982 Convention on the Law of the Sea (ibid., chap. XXI.6, p. 808) and the United Nations Framework Convention on Climate Change (ibid., chap. XXVII.7, p. 933).

453/ See e.g. P. Reuter, "Principes de droit international public", Recueil des cours de l'Académie de droit international, 1961-II, vol. 103, not. pp. 526-530; C.W. Jenks, The Proper Law of International Organizations, (London, Stevens), 1962, 282 p.; Ph. Cahier, "Le droit interne des organisations internationales", Recueil general de droit international public, 1963, pp. 563-602; or G. Balladore-Pallieri, "Le droit interne des organisations internationales", Recueil des cours de l'Académie de droit international, 1969-II, vol. 127, pp. 1-138.

according to some members, unilateral declarations made in respect of the manner in which their authors will implement their obligations under the treaty at the internal level may constitute genuine reservations (especially in the field of human rights). If that is the case, they must clearly be treated as such; but that is true of all the unilateral declarations listed in this section of the Guide to Practice. 454/

(13) Furthermore, the Commission is aware that the parties to a treaty may also - and often do - formulate unilateral declarations concerning the implementation of a treaty not at the internal level, but at the international level (announcements of financial contributions necessary to the implementation of the treaty, acceptance of an optional clause, etc.). The Commission intends to include additional material on this topic in the Guide to Practice after analysing the chapter on "Alternatives to reservations" in the Special Rapporteur's fourth report.

1.5 Unilateral statements in respect of bilateral treaties

Commentary

(1) The above draft guidelines seek to delimit as closely as possible the definition of reservations to multilateral treaties that and of other unilateral statements which are formulated in connection with a treaty and with which they may be compared, or even confused, including interpretative declarations. The Commission questioned whether it was possible to transpose these individual definitions to unilateral statements formulated in respect of bilateral treaties or at the time of their signature or of the expression of the final consent of the parties to be bound. This is the subject matter of section 1.5 of the Guide to Practice.

(2) Strictly speaking, it would have been logical to include the individual definitions which appear in the draft guidelines hereafter respectively in

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454/ According to the members who expressed this concern, if a unilateral declaration corresponds both to the definition of reservations given in draft guideline 1.1 and to that of statements concerning modalities of implementation of a treaty at the internal level given in draft guideline 1.4.5 [1.2.6], there would be no way to take a decision in favour of one qualification or the other, since the two provisions have the same legal value. According to the majority of the members, guideline 1.4.5 [1.2.6] is drafted in such a way that this possibility can arise only if reference is made to the explanations concerning the expression "purports to" given above in paragraphs (3) and (4) of the commentary to draft guideline 1.3.1.

section 1.4, insofar as draft guideline 1.5.1 [1.1.9] is concerned (since the Commission considers that so-called "reservations" to bilateral treaties do not correspond to the definition of reservations within the meaning of the present Guide to Practice), and in section 1.2, insofar as draft guidelines 1.5.2 [1.2.7] and 1.5.3 [1.2.8] are concerned (since they deal with genuine interpretative declarations). Given its particular nature, however, the Commission felt that the Guide would better serve its practical purpose if the draft guidelines devoted more specifically to unilateral statements formulated in respect of bilateral treaties were to be grouped in one separate section.

(3) The Commission considers, moreover, that the draft guidelines on unilateral statements other than reservations and interpretative declarations, grouped in section 1.4, could be applied, where necessary, to those dealing with bilateral treaties. 455/

1.5.1 [1.1.9] "Reservations" to bilateral treaties

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty to which it is subjecting the expression of its final consent to be bound, does not constitute a reservation within the meaning of the present Guide to Practice.

Commentary

(1) The 1969 and 1986 Vienna Conventions are silent on the subject of reservations to bilateral treaties: neither article 2, paragraph 1 (d), which defines reservations, nor articles 19 to 23, 456/ which set out their legal

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455/ It being understood that transposition is not always possible. In particular, draft guideline 1.4.3, concerning statements of non-recognition, is not relevant to bilateral treaties.

456/ At best, one can say that article 20, paragraph 1, and article 21, paragraph 2, are directed at "the other contracting States [and contracting organizations]" or "the other parties to the treaty", both in the plural, and that article 20, paragraph 2, deals separately with treaties in whose negotiation a limited number of States or international organizations have participated, which is exactly what happens when a treaty involves only two parties. However, this argument does not in itself provide sufficient justification to say that the Conventions acknowledge the existence of regime, raise or exclude expressly the possibility of such reservations. And the 1978 Convention on Succession of States in respect of Treaties explicitly contemplates only reservations to multilateral treaties.

(2) While at the outset of its work on reservations the Commission was divided with regard to reservations only to multilateral treaties, 457/ in 1956, Sir Gerald Fitzmaurice stressed, in his initial report, the particular features of the regime of reservations to treaties with limited participation, 458/ a category in which he expressly included bilateral

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reservations to bilateral treaties: the phrase "limited number of ... negotiating States" may mean "two or more States", but it can also be interpreted as indicating only those multilateral treaties that bind a small number of States.

457/ As early as 1950, the Commission stated that "the application ... in detail" of the principle that a reservation could become effective only with the consent of the parties "to the great variety of situations which may arise in the making of multilateral treaties was felt to require further consideration" (Report of the International Law Commission covering its second session, Official Records of the General Assembly, Fifth Session, Supplement No. 12 (A/1316), para. 164, emphasis added). The study requested of the Commission in General Assembly resolution 478 (V) was supposed to (and did) focus exclusively on "the question of reservations to multilateral conventions".

458/ The Commission also asked the question whether the particular features of "reservations" to bilateral treaties did not characterize rather the unilateral statements made with respect to "plurilateral" (or "multiple-party bilateral") treaties, such as, for example, the peace treaties concluded at the end of the First and Second World Wars. These have the appearance of multilateral treaties, but may in fact be regarded as bilateral treaties. It is doubtful whether the distinction, although interesting from the theoretical point of view, affects the scope of draft guideline 1.5.1: either the treaty will be considered to have two actual parties (despite the number of those contracting), and that situation is covered by draft guideline 1.5.1, or the statement is made by one constituent of the "multiple party" and is a conventional reservation within the meaning of draft guideline 1.1.

agreements. 459/ Likewise, in his first report, in 1962, Sir Humphrey Waldock did not exclude the case of reservations to bilateral treaties, but treated it separately. 460/

(3) However, this reference to bilateral treaties disappeared from the draft text after Sir Humphrey's proposals were considered. The introductory paragraph to the commentary on draft articles 16 and 17 (future articles 19 and 20 of the 1969 Convention) contained in the Commission's 1962 report and included in its final report in 1966 explains this as follows:

> "A reservation to a bilateral treaty presents no problem, because it amounts to a new proposal reopening the negotiations between the two States concerning the terms of the treaty. If they arrive at an agreement - either adopting or rejecting the reservation - the treaty will be concluded; if not, it will fall to the ground." 461/

Following a suggestion by the United States, the Commission had furthermore expressly entitled the section of the draft articles on reservations as "Reservations to multilateral treaties". 462/

(4) It is hardly possible, however, to draw any conclusion from this in view of the positions taken during the Vienna Conference and the decision of that Conference to revert to the heading "Reservations" for part II, section 2, of

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459/ See draft article 38 ("Reservations to bilateral treaties and other treaties with limited participation") which he proposed: "In the case of bilateral treaties, or plurilateral treaties made between a limited number of States for purposes specially interesting those States, no reservations may be made, unless the treaty in terms so permits, or all the other negotiating States expressly so agree" (Yearbook ... 1956, vol. II, p. 115).

460/ See draft article 18, paragraph 4 (a): "In the case of a bilateral treaty, the consent of the other negotiating State to the reservation shall automatically establish the reservation as a term of the treaty between the two States" (Yearbook ... 1962, vol. II, p. 61).

461/ Yearbook ... 1962, vol. II, pp. 180-181, and Yearbook ... 1966, vol. II, p. 203. In his first report, Sir Humphrey Waldock simply said: "Reservations to bilateral treaties present no problem" (Yearbook ... 1962, vol. II, p. 62).

462/ See the report of the Commission to the General Assembly on the work of the first part of its seventeenth session, Yearbook ... 1965, vol. II, p. 161, and the report of the Commission to the General Assembly on the work of its eighteenth session, Yearbook ... 1966, vol. II, p. 202; see also the comments of Sir Humphrey Waldock, fourth report on the law of treaties, Yearbook ... 1965, vol. II, p. 45.

the 1969 Convention on the Law of Treaties. It should in particular be noted that the Conference's Drafting Committee approved a Hungarian proposal to delete the reference to multilateral treaties from the title of the section on reservations 463/ in order not to prejudge the issue of reservations to bilateral treaties. 464/

(5) However, after that decision, the question occasioned an exchange of views between the President of the Conference, Mr. Roberto Ago, and the Chairman of the Drafting Committee, Mr. Mustapha K. Yasseen, 465/ which

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463/ Document A/CONF.39/C.1/L.137; see also similar amendments submitted by China (A/CONF.39/C.1/L.13) and Chile (A/CONF.39/C.1/L.22).

464/ See the explanations of Mr. Yasseen, Chairman of the Drafting Committee, United Nations Conference on the Law of Treaties, Second session, Vienna, 9 April-22 May 1969, Official Records, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, United Nations, New York, 1970, Second session, 10th plenary meeting, 29 April 1969, para. 23, p. 28.

465/ Ibid., 11th plenary meeting, 30 April 1969, p. 37:

> "19. The President said that, personally, he had been surprised to hear that the Drafting Committee had entertained the idea of reservations to bilateral treaties. As a law student, he had been taught that that idea was a contradiction in terms, for when one party to such a treaty proposed a change, that constituted a new proposal, not a reservation. He had interpreted the abbreviation of the title of Section 2 as an admission that the applicability of reservations only to multilateral treaties was self-evident. If there were any doubt on the matter, the Drafting Committee would do well to revert to the title proposed by the International Law Commission.
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> 20. Mr. Yasseen, Chairman of the Drafting Committee, said that some members of the Drafting Committee had thought that the practice of certain States might convey the impression that reservations could be made to bilateral treaties. The deletion of the reference to multilateral treaties from the title of Section 2 did not, however, mean that the Drafting Committee had decided that reservations to bilateral treaties were possible. The purpose of the deletion had merely been not to prejudge the question in any way.
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> "21. Speaking as the representative of Iraq, he said he fully shared the President's view that any change proposed to a bilateral treaty represented a new offer and could not be regarded as a reservation.
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> "22. The President asked whether the Drafting Committee agreed that the procedures set out in the articles in Section 2 related only to multilateral treaties.

indicates that the Conference had not, in fact, taken a firm position as to the existence and legal regime of possible reservations to bilateral treaties. 466/

(6) The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations sheds no new light on the question. 467/ However, the 1978 Vienna Convention on Succession of States in respect of Treaties tends to confirm the general impression gathered from a review of the 1969 and 1986 Conventions that the legal regime of reservations provided for in those Conventions (to which article 20, paragraph 3, of the 1978 Convention refers) is applicable solely to multilateral treaties and not to bilateral treaties. Indeed, article 20, the only provision of that instrument to deal with reservations, is included in section 2 of part III, 468/ which deals with multilateral treaties, 469/

> "23. Mr. Yasseen, Chairman of the Drafting Committee, said he was not in a position to confirm that statement on behalf of the entire Drafting Committee, which had not been unanimous on the point.
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> "24. The President said that, independently of the principle involved, the procedures laid down in the articles on reservations that the Conference had considered were not applicable to bilateral treaties."

466/ Writers interpret this exchange of views differently. Compare J.M. Ruda, "Reservations to Treaties", Receuil des cours ... 1975-III, vol. 146, p. 110, Renata Szafarz, "Reservations to multilateral treaties", Polish Yearbook of International Law, 1970, p. 294, and Richard W. Edwards, Jr., "Reservations to Treaties", Michigan Journal of International Law, 1989, p. 404.

467/ In his fourth report on the question of treaties concluded between States and international organizations or between two or more international organizations, Paul Reuter said: "treaties concluded by international organizations are almost always bilateral treaties, for which reservations may come into play in theory but are of no interest in practice", Yearbook ... 1975, vol. II, p. 36. See also the Report of the Commission to the General Assembly on the work of its twenty-ninth session, Yearbook ... 1977, vol. II, Part Two, commentary to draft article 19, p. 106, the Report of the Commission to the General Assembly on the work of its thirty-third session, Yearbook ... 1981, vol. II, Part Two, pp. 137-138, and the Report of the Commission on the work of its thirty-fourth session, Yearbook ... 1982, vol. II, Part Two, p. 34.

468/ Which concerns only "newly independent States".

469/ Section 3 deals with "bilateral treaties".

and expressly stipulates that it is applicable "when a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession", the notification of succession being generally admitted in respect of open multilateral treaties.

(7) Here again, however, the only conclusion one can draw is that the Vienna regime is not applicable to reservations to bilateral treaties, including in cases of succession of States. This does not mean, however, that the concept of "reservations" to bilateral treaties is inconceivable or non-existent.

(8) It is nevertheless the case that in practice some States do not hesitate to make unilateral statements, which they call "reservations" with respect to bilateral treaties, while others declare themselves hostile to them.

(9) This is a practice which has been in existence for a long time, 470/ widely used by the United States of America 471/ and, less frequently, by

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470/ The oldest example of a "reservation" to a bilateral treaty goes back to the resolution of 24 June 1795, in which the United States Senate authorized ratification of the Jay Treaty of 19 November 1794, "on condition that there be added to the said treaty an article, whereby it shall be agreed to suspend the operation of so much of the 12th article as respects the trade which his said Majesty thereby consents may be carried on, between the United States and his islands in the West Indies, in the manner, and on the terms and conditions therein specified" (quoted by William W. Bishop, Jr., Recueil des cours de l'Académie de droit international, 1961-II, vol. 103, pp. 260-261; Bishop even cites a precedent that goes back to the Articles of Confederation: in 1778, the United States Congress demanded and obtained renegotiation of the Treaty of Commerce with France of 6 February 1778 (ibid., note 13)).

471/ In 1929, Marjorie Owen estimated somewhere between 66 and 87 bilateral treaties had been subject to a "reservation" by the United States after the Senate had imposed a condition on their ratification ("Reservations to multilateral treaties", Yale Law Journal, 1928-1929, p. 1091). More recently, Kevin Kennedy compiled detailed statistics covering the period from 1795 to 1990. These data show that the United States Senate made its advice and consent to ratify conditional for 115 bilateral treaties during that period, a figure that includes interpretative declarations, which account for 15 per cent on average of all bilateral treaties to which the United States has become a party in just under two centuries (Kevin C. Kennedy, "Conditional approval of treaties by the U.S. Senate", Loyola of Los Angeles International and Comparative Journal, October 1996, p. 98). The same statistics show that this practice of "amendments" or "reservations" involves all categories of agreement and is particularly frequent in the area of extradition, friendship, commerce and navigation treaties ("FCN treaties", and even peace treaties (see ibid., pp. 99-103 and 112-116)). In its response to the questionnaire on reservations, the United States of America confirmed that this practice remains important where other States in their relations with the United States. 472/ The fact remains that, of all the States which replied to the International Law Commission questionnaire on reservations, only the United States gave an affirmative to question 1.4; 473/ all the others answered in the negative. 474/ Some of them simply said that they do not formulate reservations to bilateral treaties, but others indicated their concerns about that practice. 475/

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the country's bilateral treaties are concerned. The United States attached to its response a list of 13 bilateral treaties that were accepted with reservations between 1975 and 1985. Such was the case, for example, of the Treaties concerning the permanent neutrality and operation of the Panama Canal of 7 September 1977, the Special Agreement under which Canada and the United States agreed to submit their dispute on the delimitation of maritime zones in the Gulf of Maine area to the International Court of Justice, and the Supplementary Extradition Treaty with the United Kingdom of 25 June 1985.

472/ Either its partners make counter-proposals in response to the reservations of the United States (see examples given by Marjorie Owen, "Reservations to multilateral treaties", Yale Law Journal, 1928-1929, pp. 1090-1091 and William W. Bishop, Jr., "Reservations to treaties", Recueil des cours de l'Académie de droit international 1961-II, vol. 103, pp. 2667-269), or they themselves take the initiative (see the examples given by Marjorie M. Whiteman, Digest of International Law, vol. 14, 1970, p. 161 (Japan), M. Owen, ibid., p. 1093 (New Grenada), Green Haywood Hackworth, Digest of International Law, vol. V, Washington, D.C., United States Printing Office, 1943, pp. 126-130 (Portugal, Costa Rica, El Salvador, Romania).

473/ The question read: "Has the State formulated reservations to bilateral treaties?".

474/ Bolivia, Canada, Chile, Croatia, Denmark, Finland, France, Germany, Holy See, India, Israel, Italy, Japan, Republic of Korea, Kuwait, Mexico, Monaco, Panama, Peru, San Marino, Slovakia, Slovenia, Spain, Sweden and Switzerland.

475/ See Germany's position:

> "The Federal Republic has not formulated reservations to bilateral treaties. It shares the commonly held view that a State seeking to attach a reservation to a bilateral treaty would in effect refuse acceptance of that treaty as drafted. This would constitute an offer for a differently formulated treaty incorporating the content of the reservation and would thus result in the reopening of negotiations."

The replies from Italy and the United Kingdom were very similar. However, the United Kingdom added:

> "The United Kingdom does not itself seek to make reservations a condition of acceptance of a bilateral treaty. If Parliament were

(10) Another important feature of the practice of States in this area is the fact that, in all cases where the United States or its partners have entered "reservations" (often called "amendments" 476/) to bilateral treaties, they have endeavoured in all cases to renegotiate the treaty in question and to obtain the other Party's acceptance of the modification which is the subject of the "reservation". 477/ If agreement is obtained, the treaty enters into

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(exceptionally) to refuse to enact the legislation necessary to enable the United Kingdom to give effect to a bilateral treaty, the United Kingdom authorities would normally seek to renegotiate the treaty in an endeavour to overcome the difficulties."

476/ Kevin C. Kennedy has identified 12 different categories of conditions set by the United States Senate for ratification of treaties (bilateral and multilateral), but notes that four of these account for 90 per cent of all cases: "understandings", "reservations", "amendments" and "declarations". However, the relative share of each varies over time, as the following table shows:

Type of condition	1845-1895	1896-1945	1946-1990
Amendments	36	22	3
Declarations	0	3	14
Reservations	1	17	44
Understandings	1	38	32

("Conditional approval of treaties by the U.S. Senate", Loyola of Los Angeles International and Comparative Law Journal, October 1996, p. 100).

477/ As the Department of State noted in its instructions to the American Ambassador in Madrid following Spain's refusal to accept an "amendment" to a 1904 extradition treaty which the Senate had adopted, "[t]he action of the Senate consists in advising an amendment which, if accepted by the other party, is consented to in advance. In other words, the Senate advises that the President negotiate with the foreign Government with a view to obtaining its acceptance of the advised amendment." (Quoted by Green Haywood Hackworth, Digest of International Law, vol. V (Washington, D.C., United States Printing Office, 1943), p. 115.

force with the modification in question; 478/ if not, the ratification process is discontinued and the treaty does not enter into force. 479/

(11) In the Commission's opinion, the following conclusions may be drawn from this review:

1. With the exception of the United States of America, States seldom formulate reservations to bilateral treaties, although exceptions do exist (but these apparently occur only in the context of bilateral treaty relations with the United States); and

2. This practice, which may elicit constitutional objections in some countries, does not do so at the international level, if only because the States concluding treaties with the United States of America, having on occasion rejected reservations proposed by that country, have never raised any objections of principle and have even, in some cases, submitted their own "counter-reservations" of a similar nature.

478/ In some cases, the other contracting Party makes "Counter-offers" which are also incorporated into the treaty. For example, Napoleon accepted a modification made by the Senate to the Treaty of Peace and Amity of 1800 between the United States and France, but then attached his own condition to it, which the Senate accepted (see Marjorie Owen, "Reservations to Multilateral Treaties", Yale Law Journal, 1928-1929, pp. 1090-1091, or William W. Bishop, Jr., "Reservation to Treaties", Recueil des cours de l'Académie de droit international 1960-II, vol. 103, pp. 267-268).

479/ See, for example, the United Kingdom's rejection of amendments to an 1803 convention concerning the border between Canada and the United States and an 1824 convention for suppression of the African slave trade which the United States had requested (see William W. Bishop, Jr., "Reservations to Treaties", Recueil des cours de l'Académie de droit international 1961-II, vol. 103, p. 266) or the United Kingdom's refusal to accept the United States reservations to the treaty of 20 December 1900 dealing with the Panama Canal, which was consequently renegotiated and led to the signing of a new agreement, the Hay-Pauncefote Treaty of 28 November 1902. See Green Haywood Hackworth, Digest of International Law, vol. V (Washington, D.C., United States Printing Office, 1943, pp. 113-114). An even more complicated case concerns ratification of the Convention of Friendship, Reciprocal Establishments, Commerce and Extradition between the United States of America and Switzerland of 25 November 1850, which was the subject of a request for amendments, first by the United States Senate, then by Switzerland, and then again by the Senate, all of which were adopted and the instruments of ratification, which had been amended three times, exchanged five years after the date of signature (ibid., p. 269).

(12) As indicated by the practice described above, despite some obvious points in common with reservations to multilateral treaties, "reservations" to bilateral treaties are different in one key respect: their intended and their actual effects.

(13) There is no doubt that reservations to bilateral treaties are formulated unilaterally by States (and, a priori, nothing prevents an international organization from doing the same) once the negotiations have ended and they bear different names that may reflect real differences in domestic law, but not in international law. From these different standpoints, they meet the first three criteria set out in the Vienna definition, reproduced in draft guideline 1.1.

(14) The Commission has found that a "reservation" to a bilateral treaty may be made at any time after the negotiations have ended, once a signature has been put to the final agreed text, but before the treaty enters into force, as such statements are aimed at modifying its text.

(15) But this is precisely the feature which distinguishes such "reservations" to bilateral treaties from reservations to multilateral treaties. There is no doubt that, with a "reservation", one of the contracting parties to a bilateral treaty intends to modify the legal effect of the provisions of the original treaty. But while a reservation does not affect the provisions of the instrument in the case of a multilateral treaty, a "reservation" to a bilateral treaty seeks to modify it: if the reservation produces the effects sought by its author, it is not the "legal effect" of the provisions in question that will be modified or excluded "in their application" to the author; it is the provisions themselves that will be modified. A reservation to a multilateral treaty has a subjective effect: if it is accepted, the legal effect of the provisions in question is modified vis-à-vis the State or the international organization that formulated it. A reservation to a bilateral treaty has an objective effect: if it is accepted by the other State, it is the treaty itself that is amended.

(16) Similarly, there is no doubt that a reservation to a multilateral treaty produces effects only if it is accepted, in one way or another, expressly or implicitly, by at least one of the other contracting States or international

organizations. 480/ The same is true for a reservation to a bilateral treaty: the co-contracting State or international organization must accept the "reservation", or else the treaty will not enter into force. Thus the difference does not have to do with the need for acceptance, which is present in both cases, in order for the reservation to produce its effects, but with the consequences of acceptance:

In the case of a multilateral treaty, an objection does not prevent the instrument from entering into force, even, at times, between the objecting State or international organization and the author of the reservation, 481/ and its provisions remain intact;

In the case of a bilateral treaty, the absence of acceptance by the co-contracting State or international organization prevents the entry into force of the treaty; acceptance involves its modification.

(17) Thus a "reservation" to a bilateral treaty appears to be a proposal to amend the treaty in question or an offer to renegotiate it. This analysis corresponds to the prevailing views in doctrine. 482/ Moreover, saying that acceptance of a "reservation" to a bilateral treaty is equivalent to amending the treaty does not make the reservation an amendment: it is simply a

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480/ Article 20 of the 1969 and 1986 Conventions states that a reservation can have been accepted in advance by all the signatory States and be expressly authorized by the treaty (para. 1), or it can be expressly accepted (paras. 2, 3 and 4), or it can be "considered to have been accepted" if no objection is raised within 12 months (para. 5).

481/ See article 20, para. 4 (b), of the 1969 and 1986 Conventions.

482/ Some authors have concluded that a reservation to a bilateral treaty is purely and simply inconceivable (see Charles Rousseau, Droit international public, vol. I, Introduction et sources (Paris, Pédone, 1970), p. 122, or Alfredo Maresca, Il diritto dei tratatti - La Convenzione codificatrice di Vienna del 23 Maggio 1969 (Milan, Giuffrè, 1971), pp. 281-282). But all stress the need for the express consent of the other party and the resulting modification of the treaty's actual text (see David Hunter Miller, Reservations to Treaties: The Effect and the Procedure in Regard Thereto (Washington, D.C., 1919), pp. 76-77; Marjorie Owen, "Reservations to multilateral treaties", Yale Law Journal, 1928-1929, pp. 1093-1094; William W. Bishop, Jr., "Reservations to Treaties", Recueil des cours de l'Académie de droit international 1961-II, vol. 103, p. 271, note 14.

unilateral proposal to amend, prior to the treaty's entry into force, 483/ while the amendment itself is treaty-based, is the result of an agreement between the parties 484/ and is incorporated into the negotiated text, even if it can be contained in one or more separate instruments.

(18) As the Solicitor for the Department of State noted in a memorandum dated 18 April 1921:

> "The action of the Senate when it undertakes to make so-called 'reservations' to a treaty is evidently the same in effect as when it makes so-called 'amendments', whenever such reservations and amendments in any substantial way affect the terms of the treaty. The so-called reservations which the Senate has been making from time to time are really not reservations as that term has generally been understood in international practice up to recent times." 485/

(19) This is also the view of the Commission, which believes that unilateral statements by which a State (or an international organization) purports to obtain a modification of a treaty whose final text has been agreed on by the negotiators does not constitute a reservation in the usual meaning of the term in a treaty framework, as has been confirmed by the 1969, 1978 and 1986 Vienna Conventions.

(20) Although most of the members of the Commission consider such a statement to constitute an offer to renegotiate the treaty, which, if accepted by the other party, becomes an amendment to the treaty, it does not appear essential for this to be stated in the Guide to Practice, since, as the different

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483/ The term "counter-offer" has been used. Marjorie Owen ("Reservations to multilateral treaties", Yale Law Journal, 1928-1929, p. 1091) traces this idea of a "counter-offer" back to Hyde, International Law, 1922, para. 519. The expression also appears in the American Law Institute's Restatement of the Law Third - The Foreign Relations Law of the United States, Washington, D.C., vol. 1, 14 May 1986, para. 113, p. 182; see also the position of Mr. Ago and Mr. Yasseen, cited in note 465 above, and that of Paul Reuter, note 467 above).

484/ See article 39 of the 1969 and 1986 Conventions.

485/ Quoted by Green Haywood Hackworth, Digest of International Law, vol. V, United States Printing Office, Washington, 1943, p. 112; along the same lines, see the position of David Hunter Miller, note 482 above.

categories of unilateral statement mentioned in section 1.4 above are neither reservations in the usual meaning of the term nor interpretative statements, they do not fall within the scope of the treaty. 486/

1.5.2 [1.2.7] Interpretative declarations in respect of bilateral treaties

Draft guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties.

Commentary

(1) The silence of the Vienna Conventions on the Law of Treaties extends *a fortiori* to interpretative declarations made in respect of bilateral treaties: the Conventions do not mention interpretative declarations in general 487/ and are quite cautious insofar as the rules applicable to bilateral treaties are concerned. 488/ Such declarations are nonetheless common and, unlike "reservations" to the same treaties, 489/ they correspond in all respects to the definition of interpretative declarations adopted for draft guideline 1.2.

(2) Almost as old as the practice of "reservations" to bilateral treaties, 490/ the practice of interpretative declarations in respect of such treaties is less geographically limited 491/ and does not seem to give rise to objections where principles are concerned. As for the present situation, of

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486/ See draft guideline 1.4 and the commentary thereto.

487/ See paragraph (1) of the commentary to draft guideline 1.2.

488/ See paragraph (1) of the commentary to draft guideline 1.5.1 [1.1.9].

489/ See draft guideline 1.5.1 [1.1.9] and the commentary thereto.

490/ William Bishop notes a declaration attached by Spain to its instrument of ratification of the Treaty of 22 February 1819 ceding Florida ("Reservations to Treaties", *Recueil des cours ...* 1961-II, vol. 103, p. 316).

491/ See the commentary to draft guideline 1.5.1 [1.1.9], paragraphs (9) to (11). However, as with "reservations" to bilateral treaties, the largest number of examples can be found in the practice of the United States of America; in just the period covered by that country's reply to the questionnaire on reservations (1975-1995), it mentions 28 bilateral treaties to which it attached interpretative declarations upon expressing its consent to be bound.

the 22 States that answered question 3.3 492/ of the Commission's questionnaire on reservations, four said that they had formulated interpretative declarations in respect of bilateral treaties; and one international organization, the International Labour Organization (ILO), wrote that it had done so in one situation, while noting that the statement was in reality a "corrigendum", "made in order not to delay signature". However incomplete, these results are nevertheless significant: while only the United States claimed to make "reservations" to bilateral treaties, 493/ it is joined here by Panama, Slovakia and the United Kingdom and by one international organization; 494/ and while several States criticized the very principle of "reservations" to bilateral treaties, 495/ none of them showed any hesitation concerning the formulation of interpretative declarations in respect of such treaties. 496/

(3) The extent and consistency of the practice of interpretative declarations in respect of bilateral treaties leave little doubt as to how this institution is viewed in international law: it is clearly a "general practice accepted as law".

(4) Whereas the word "reservation" certainly does not have the same meaning when it is applied to a unilateral statement made in respect of a bilateral treaty as it does when it concerns a multilateral instrument, the same is not true in the case of interpretative declarations: in both cases, they are

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492/ "Has the State attached any interpretative declarations to the expression of its consent to be bound by bilateral treaties?"

493/ See the commentary to draft guideline 1.5.1 [1.1.9], paragraph (9).

494/ In addition, Sweden said: "It may have happened, although very rarely, that Sweden has made interpretative declarations, properly speaking, with regard to bilateral treaties. [...] Declarations of a purely informative nature of course exist".

495/ See the commentary to draft guideline 1.5.1 [1.1.9], note 240.

496/ The United Kingdom criticizes the United States *understanding* on the matter of the Treaty concerning the Cayman Islands relating to Mutual Legal Assistance; but what the Government of the United Kingdom seems to be rejecting here is the possibility of modifying a bilateral treaty under the guise of interpretation (by means of "*understandings*" which are really "reservations").

unilateral statements, however named or phrased, made "by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions". 497/ Thus, draft guideline 1.2, which provides this definition, may be considered to be applicable to declarations which interpret bilateral as well as multilateral treaties.

(5) On one point, however, the practice of interpretative declarations in respect of bilateral treaties seems to differ somewhat from the common practice for multilateral treaties. Indeed, it appears from what has been written that "in the case of a bilateral treaty it is the invariable practice, prior to the making of arrangements for the exchange of ratifications and sometimes even prior to ratification of the treaty, for the government making the statement or declaration to notify the other government thereof in order that the latter may have an opportunity to accept, reject, or otherwise express its views with respect thereto". 498/ And, once approved, the declaration becomes part of the treaty:

> "... where one of the parties to a treaty, at the time of its ratification annexes a written declaration explaining ambiguous language in the instrument [...], and when the treaty is afterwards ratified by the other party with the declaration attached to it, and their ratifications duly exchanged - the declaration thus annexed is part of the treaty and as binding and obligatory as if it were inserted in the body of the instrument. The intention of the parties is to be gathered from the whole instrument, as it stood when the ratifications were exchanged." 499/

(6) It is difficult to argue with this reasoning, which leads one to ask whether interpretative declarations which are made in respect of bilateral

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497/ Cf. draft guideline 1.2.

498/ Marjorie M. Whiteman, Digest of International Law, vol. 14, 1970, pp. 188-189.

499/ Judgement of the United States Supreme Court concerning the Spanish declaration made in respect of the Treaty of 22 February 1819, Doe v. Braden, 16 How. 635, 656 (US 1853), cited by William W. Bishop, Jr., op. cit., p. 316.

treaties, just like "reservations" to such treaties, 500/ must necessarily be accepted by the other party. In reality, this does not seem to be the case: in (virtually?) all cases, interpretative declarations made in respect of bilateral treaties have been accepted because the formulating State requested it, but one can easily imagine that it might not make such a request. Indeed, the logic which leads one to distinguish between interpretative declarations which are conditional and those which are not 501/ would seem to be easily transposed to the case of bilateral treaties: everything depends on the author's intention. It may be the condition sine qua non of the author's consent to the treaty, in which case it is a conditional interpretative declaration, identical in nature to those made in respect of multilateral treaties and consistent with the definition proposed in draft guideline 1.2.1 [1.2.4]. But it may also be simply intended to inform the partner of the meaning and scope which the author attributes to the provisions of the treaty without, however, seeking to impose that interpretation on the partner, and in this case it is a "simple interpretative declaration", which, like those made in respect of multilateral treaties, 502/ can actually be made at any time.

(7) Accordingly, the Commission felt that it was not necessary to adopt specific draft guidelines on interpretative declarations in respect of bilateral treaties, since these fall under the same definition as interpretative declarations in respect of multilateral treaties, whether it be their general definition, as given in draft guideline 1.2, or the distinction between simple and conditional interpretative declarations which follows from draft guideline 1.2.1 [1.2.4]. It therefore seems to be sufficient to take note of this in the Guide to Practice.

(8) On the other hand, draft guideline 1.2.2 [1.2.1], concerning interpretative declarations formulated jointly, is not, of course, relevant in the case of bilateral treaties.

500/ See paragraphs (16) to (20) of the commentary to draft guideline 1.5.1 [1.1.9].

501/ See draft guideline 1.2.1 [1.2.4] and the commentary thereto.

502/ See draft guideline 1.2 and paragraphs (21) to (30) of the commentary thereto.

(9) As regards section 1.3 of this chapter of the Guide to Practice, concerning the distinction between reservations and interpretative declarations, it is difficult to see how, if the term "reservations" in respect of bilateral treaties does not correspond to the definition of reservations given in draft guideline 1.1, it would be applicable to the latter. At best, it may be thought that the principles set forth therein can be applied, mutatis mutandis, to distinguish interpretative declarations from other unilateral statements made in respect of bilateral treaties.

1.5.3 [1.2.8] Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes the authentic interpretation of that treaty.

Commentary

(1) Although acceptance of an interpretative declaration formulated by a State in respect of a bilateral treaty is not inherent in such a declaration, 503/ it might be asked whether acceptance modifies the legal nature of the interpretative declaration.

(2) In the Commission's opinion, the reply to this question is affirmative: when an interpretative declaration made in respect of a bilateral treaty is accepted by the other party, 504/ it becomes an integral part of the treaty and constitutes the authentic interpretation thereof. As the Permanent Court of International Justice noted, "the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it". 505/ Yet in the case of a bilateral treaty this power belongs to both parties. Accordingly, if they agree on an interpretation, that interpretation prevails and itself takes on the nature of

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503/ See paragraphs (5) and (6) of the commentary to draft guideline 1.5.2 [1.2.7].

504/ And one can imagine that this would be the case even when an interpretative declaration is not conditional.

505/ Advisory Opinion of 6 December 1923, Jaworzina case, Series B, No. 8, p. 37.

a treaty, regardless of its form, 506/ exactly as "reservations" to bilateral treaties do once they have been accepted by the co-contracting State or international organization. 507/ It becomes an agreement collateral to the treaty which forms part of its context in the sense of paragraphs 2 and 3 (a) of article 31 of the 1969 and 1986 Vienna Conventions; as such, it must be taken into consideration in interpreting the treaty. 508/ And this analysis is consistent with that of the United States Supreme Court in the Doe case. 509/

(3) While it is aware that considering this phenomenon in the first part of the Guide to Practice exceeds the scope of that part, which is devoted to the definition, and not the legal regime, of reservations and interpretative declarations, 510/ the Commission has seen fit to mention it in a draft guideline. It does not in fact intend to return to the highly specific question of "reservations" and interpretative declarations in respect of bilateral treaties: in the first case, because they are not reservations, in the second, because interpretative declarations to bilateral treaties have no distinguishing feature with respect to interpretative declarations to multilateral treaties, except precisely the one covered in draft guideline 1.5.2 [1.2.7]. For purely practical reasons, therefore, it seems appropriate to make that clear at this stage.

506/ Exchange of letters, protocol, simple oral agreement, etc.

507/ See draft guideline 1.5.1 [1.1.9] and paragraphs (15) to (19) of the commentary thereto.

508/ Article 31 of the 1969 Convention reads: "2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions."

509/ See commentary to draft guideline 1.5.2 [1.2.7], note 254.

510/ See draft guideline 1.6.

1.6 [1.4] Scope of definitions

The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the permissibility and effects of such statements under the rules applicable to them.

Commentary

(1) The above draft guideline was adopted provisionally by the Commission in 1998 at its fiftieth session in a form which referred only to reservations. The related draft commentary indicated that its title and its placement within the Guide to Practice would be determined at a later stage and that the Commission would consider the possibility of referring, under a single caveat, both to reservations and interpretative declarations, which, in the view of some members, posed identical problems. 511/ At its fifty-first session, the Commission as a whole adopted this approach, deeming it necessary to clarify and specify the scope of the entire set of draft guidelines with respect to the definition of the entire set of unilateral statements they define in order to make their particular object clear.

(2) Defining is not the same as regulating. As "a precise statement of the essential nature of a thing", 512/ the sole function of a definition is to determine the general category in which a given statement should be classified. However, this classification does not in any way prejudge the validity of the statements in question: a reservation may or may not be permissible, but it remains a reservation if it corresponds to the definition established. *A contrario*, it is not a reservation if it does not meet the criteria set forth in these draft guidelines (and in those which the Commission intends to adopt next year), but this does not necessarily mean that such statements are permissible (or impermissible) from the standpoint of other rules of international law. The same is true of interpretative

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511/ Report of the International Law Commission on the work of its fiftieth session, 1998, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 213-214.

512/ *The Oxford English Dictionary*, 2nd ed. (Oxford, The Clarendon Press, 1989).

declarations, which might conceivably not be permissible, either because they would alter the nature of the treaty or because they were not formulated at the required time; 513/ etc. 514/

(3) Furthermore, the exact determination of the nature of a statement is a precondition for the application of a particular legal regime, in the first place, for the assessment of its permissibility. It is only once a particular instrument has been defined as a reservation (or an interpretative declaration, either simple or conditional) that a decision can be taken as to whether it is permissible or not, its legal scope can be evaluated and its effect can be determined. However, this permissibility and these effects are not otherwise affected by the definition, which requires only that the relevant rules be applied.

(4) For example, the fact that draft guideline 1.1.2 indicates that a reservation "may be formulated" in all of the cases referred to in draft guideline 1.1 and in article 11 of the 1969 and 1986 Vienna Conventions does not mean that such a reservation is necessarily permissible; its permissibility depends upon whether it meets the conditions stipulated in the law on reservations to treaties and, in particular, those stipulated in article 19 of these Conventions. Similarly, the Commission's confirmation of the well-established practice of "across-the-board" reservations in draft guideline 1.1.1 [1.1.4] is in no way meant to constitute a decision on the permissibility of such a reservation in a specific case which depends on its contents and context; the sole purpose of the draft is to show that a unilateral statement of such a nature is indeed a reservation and as such subject to the legal regime governing reservations.

(5) The "rules applicable" referred to in draft guideline 1.6 are, first of all, the relevant rules in the 1969, 1978 and 1986 Vienna Conventions and, in general, the customary rules applicable to reservations and to interpretative declarations, which this Guide to Practice is intended to codify and develop

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513/ This problem may very likely arise in connection with conditional interpretative declarations (see draft guideline 1.2.1).

514/ The same may obviously be said about unilateral statements which are neither reservations nor interpretative declarations as mentioned in section 1.4.

progressively in accordance with the Commission's mandate, and those relating to other unilateral statements which States and international organizations may formulate in respect of treaties, but which are not covered in the Guide to Practice.

(6) More generally, all of the draft guidelines adopted thus far are interdependent and cannot be read and understood in isolation from one another.

CHAPTER VII

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

A. Introduction

471. At its forty-third session in 1991, the Commission concluded the second reading of the draft articles on jurisdictional immunities of States and their property. 515/

472. By paragraph 4 of resolution 46/55 of 9 December 1991, the General Assembly decided to establish at its forty-seventh session an open-ended Working Group of the Sixth Committee to examine, inter alia, the issues of substance arising out of the draft articles, in order to facilitate a successful conclusion of a convention through the production of general agreement.

473. The Working Group met between 25 September and 6 November 1992 and produced a report summarizing its work. 516/

474. By its decision 47/414 of 25 November 1992, the General Assembly, inter alia decided to re-establish the Working Group at its fifty-eighth session, in the framework of the Sixth Committee to continue the examination, inter alia, of the issues referred to in the previous paragraph.

475. The Working Group met between 27 September and 8 December 1993 and on 11 November 1993 and produced a report summarizing its work. 517/

476. By its decision 48/413 of 9 December 1993, the General Assembly, inter alia, decided that consultations should be held in the framework of the Sixth Committee, at its forty-ninth session, to continue consideration of the substantive issues regarding which the identification and attenuation of differences was desirable in order to facilitate the successful conclusion of a convention through general agreement.

477. The informal consultations were held from 26 to 30 September and on 3 October 1994. The Chairman of the consultations reported to the

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515/ See Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10 (A/46/10), paras. 25-26. For the history of the topic up to that moment, see ibid. paras. 17 to 24 and documents cited therein.

516/ Document A/C.6/47/L.10.

517/ Document A/C.6/48/L.4.

Sixth Committee on his conclusions concerning the main issues of substance and a possible basis for achieving a compromise with respect to those issues. 518/

478. By its resolution 49/61 of 9 December 1994, the General Assembly, inter alia, invited States to submit to the Secretary-General their comments on the conclusions of the Chairman of the Informal consultations referred to in paragraph 7 above and on the reports of the Working Group referred to in paragraphs 3 and 5 above. The Assembly further decided to resume consideration at its fifty-second session of the issues of substance, in the light of the reports mentioned above and the comments submitted by States thereon.

479. By resolution 52/151 of 15 December 1997, the General Assembly, inter alia, decided to consider the item again at its fifty-third session with a view to the establishment of a Working Group at its fifty-fourth session, taking into account the comments submitted by States in accordance with resolution 49/61.

480. By paragraphs 1 and 2 of resolution 53/98 of 8 December 1998, the General Assembly: (1) decided to establish at its fifty-fourth session an open-ended working group of the Sixth Committee open also to participation by States members of the specialized agencies, to consider outstanding substantive issues related to the draft articles on Jurisdictional Immunities of States and their property adopted by the International Law Commission, taking into account the recent developments of State practice and legislation and any other factors related to this issue since the adoption of the draft articles, as well as the comments submitted by States in accordance with paragraph 2 of resolution 49/61 and paragraph 2 of resolution 52/151, and to consider whether there are any issues identified by the working group upon which it would be useful to seek further comments and recommendations of the Commission; and (2) invited the International Law Commission to present any preliminary comments it may have regarding outstanding substantive issues related to the draft articles by 31 August 1999, in the light of the results of the informal consultations held pursuant to General Assembly decision 48/413 of 9 December 1993, and taking into account the recent

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518/ Document A/C.6/49/L.2.

developments of State practice and other factors related to this issue since the adoption of the draft articles, in order to facilitate the task of the working group.

B. Consideration of the topic at the present session

481. At its 2569th meeting, on 7 May 1999, the Commission decided to establish a Working Group on Jurisdictional Immunities of States and their property which would be entrusted with the task of preparing preliminary comments as requested by operative paragraph 2 of General Assembly resolution 53/98 of 8 December 1998. It also decided to appoint Mr. G. Hafner as Chairman of the Working Group. [519]

482. The Working Group held 10 meetings between 1 June and 5 July 1999 and submitted a report to the Commission contained in document A/CN.4/L.576.

483. At its 2601st and 2602nd meetings on 13 and 14 July 1999, the Commission considered the report of the Working Group. It was presented by its Chairman who introduced some drafting changes on behalf of the Group.

484. After an exchange of views, the Commission decided to take note of the report of the Working Group, which would be annexed to the Commission's report. It also decided to adopt the suggestions of the Working Group, as amended in the course of the discussion. These suggestions are contained in paragraphs 24-30; 56-60; 78-83; 103-107 and 125-129 of the Working Group's report annexed to the present report.

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[519] For the composition of the Working Group, see Chapter I (Introduction) of the report of the International Law Commission on the work of its fifty-first session, para. 10.

CHAPTER VIII

UNILATERAL ACTS OF STATES

A. Introduction

485. In the report on the work of its forty-eighth session, in 1996, the Commission proposed to the General Assembly that the law of unilateral acts of States should be included as a topic appropriate for the codification and progressive development of international law. 520/

486. The General Assembly, in paragraph 13 of resolution 51/160, *inter alia*, invited the Commission to further examine the topic "Unilateral acts of States" and to indicate its scope and content.

487. At its forty-ninth session, in 1997, the Commission established a Working Group on this topic which reported to the Commission on the admissibility and facility of a study on the topic, its possible scope and content and an outline for a study on the topic. At the same session, the Commission considered and endorsed the report of the Working Group. 521/

488. Also at its forty ninth session, the Commission appointed Mr. Victor Rodriguez Cedeño, Special Rapporteur on the topic. 522/

489. The General Assembly, in paragraph 8 of its resolution 52/156 endorsed the Commission's decision to include the topic in its agenda.

490. At its fiftieth session, in 1998, the Commission had before it and considered the Special Rapporteur's first report on the topic 1. 523/ As a result of its discussion, the Commission decided to reconvene the Working Group on Unilateral Acts of States.

491. The Working Group reported to the Commission on issues related to the scope of the topic, its approach, the definition of unilateral act and the

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520/ See *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), p. 230 and pp. 328-329.

521/ See *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), paras. 196-210 and 194.

522/ Ibid., paras. 212 and 234.

523/ A/CN.4/486.

future work of the Special Rapporteur. At the same session, the Commission considered and endorsed the report of the Working Group 1. 524/

492. The General Assembly, in paragraph 3 of its resolution 53/102 recommended that, taking into account the comments and observations of Governments, whether in writing or expressed fully in debates in the General Assembly, the Commission should continue its work on the topics in its current programme.

B. Consideration of the topic at the present session

493. At the present session, the Commission had before it the Special Rapporteur's second report on the topic 1. 525/ The Commission considered the report at its 2593rd to 2596th meetings from 24 June to 2 July 1999.

1. Introduction by the Special Rapporteur of his second report

494. The Special Rapporteur said that, in terms of both structure and spirit, the 1969 Vienna Convention on the Law of Treaties was the appropriate frame of reference for the Commission's present work. That did not mean that the rules applicable to treaty acts laid down in the 1969 Convention were applicable *mutatis mutandis* to unilateral acts. If that were so, there would be no need to regulate the functioning of unilateral acts, which were to be understood as autonomous or independent acts with their own distinctive characteristics and were to be distinguished from unilateral acts which fell within the scope of treaties and for which specific operational rules could be formulated.

495. There were important differences, he said, between treaty acts and unilateral acts. The former were based on an agreement (a joint expression of will) involving two or more subjects of international law, while the latter were based on an expression of will - whether individual or collective - with a view to creating a new legal relationship with another State or States or with subjects of international law that had not participated in the formulation or elaboration of the act.

496. To determine the specific character of unilateral acts and justify the formulation of specific rules, possibly based on different criteria from those applicable to treaty acts, it should be borne in mind that a State usually

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524/ See *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), paras. 192-201.

525/ A/CN.4/500 and Add.1.

formulated a unilateral act when it could not or did not wish to negotiate a treaty act, i.e. when, for political reasons, it did not wish to enter into negotiations. As an example, the Special Rapporteur mentioned unilateral declarations by nuclear-weapon States containing negative security guarantees in the context of disarmament negotiations formulated outside the context of bilateral or multilateral negotiations and without the participation of the addresses - the non-nuclear-weapon States.

497. It followed that a different approach was required in elaborating rules to govern the operation of unilateral legal acts. In particular, they should be restrictive, particularly as regards the expression of consent, the interpretation and the effects of such acts. In this connection, the Special Rapporteur stressed the need to take full account of political realities as well as the views of States which would probably prefer rules that did not unduly restrict their political and legal freedom of action in the international field.

498. Referring to the comments by State representatives in the Sixth Committee, the Special Rapporteur said that the existence of a specific category of unilateral State acts had been recognized. In international relations, States usually acted, in both the political and legal field, through the formulation of unilateral acts. Some were unequivocally political; others were easily identifiable as belonging in the legal field. Still others were ambiguous and would require careful study to determine in which category they belonged. In the case of legal acts, some were designed solely to produce internal legal effects and could be ignored. Concerning those seeking to produce international legal effects, it was a well-established principle of international law that a State could not impose obligations on other States or subjects of international law without their consent.

499. Furthermore, according to the Special Rapporteur, some unilateral acts could produce international legal effects but not qualify as autonomous, such as those acts related to a pre-existing norm, whether of customary, treaty or even unilateral origin.

500. The Special Rapporteur also pointed out that unilateral acts could be formulated by one State, in which case they were unilateral acts of individual origin, or they could be formulated by two or more States, in which case they

would be of collective or joint origin. The latter, in turn, presented significant variations, since collective acts might be based on a single instrument, while joint acts would be formulated through separate acts but of similar purport.

501. While all those acts were unilateral in their elaboration, that did not prevent them from having a bilateral effect, i.e. where there was a possibility of the relationship created in a unilateral way becoming bilateral when the addressee acquired a right and exercised it. However, the unilateral nature of the act was not based on that possible synallagmatic effect but depended on the coming into existence of the act at the time of its formulation.

502. The Special Rapporteur referred to what he termed as the question of the autonomy of the unilateral act. In his view, a unilateral act thus existed when it was formally unilateral, when it did not depend on a pre-existing act (first form of autonomy) and when the obligation incurred was independent of its acceptance by another State (second form of autonomy). The second form of autonomy had been confirmed not only by a large body of legal opinion but also by the International Court of Justice, especially in its 1974 judgments in the Nuclear Tests cases.

503. In the Special Rapporteur's view, it was also important to distinguish between the formal act and the material act, since it would then be possible to distinguish the operation whereby the legal effects were created from the actual act itself. It followed that the formal act, as a result of which the effects - particularly the obligation - came into being, was the declaration.

504. In the Special Rapporteur's view, much as in treaty law the treaty was the basic instrument used by States to create legal effects, in the law governing unilateral acts that basic instrument was the declaration.

505. The Special Rapporteur recognized that not everyone in the Sixth Committee or the Commission concurred with that assessment. Some felt that the use of the term declaration to identify a legal act would be restrictive inasmuch as other unilateral acts could be left outside the scope of the present study or regulatory provisions. But, in his view, that need not be the case, because the declaration as a formal act was unique, while material acts, i.e. the content of such acts, could be diverse. For example, a waiver, a protest, a recognition or a promise was an act with its own separate

characteristics, which would make the establishment of rules governing all such acts a complex task. He noted, however, that consideration of the material act would be important when the rules governing its effects would be elaborated. Rules that were consistent with the various effects of each of those acts would probably need to be formulated. However, in his view, and for the time being, the Commission should focus on the declaration as a formal act creating legal norms. The rules applicable to a declaration, as a formal act whereby a State waived a right or a claim, recognized a situation, made a protest or promised to act in a particular way, could be homogeneous, but the rules governing the effects would have to correspond to the category of the material act - a waiver, a recognition, a protest or a promise.

506. The Special Rapporteur went on to examine some questions raised in the Sixth Committee about the relationship between unilateral acts and acts pertaining to international responsibility, international organizations, estoppel, reservations and interpretative declarations.

507. As regards acts related to international responsibility, the Special Rapporteur distinguished between the autonomous primary act, which could give rise to international obligations and fell within the purview of this topic and a secondary act or act by a State that failed to fulfil a previously incurred unilateral obligation thus forming the basis for the State's international responsibility. This secondary act was not autonomous in the same way as the primary act, despite being unilateral in formal terms, since it related to a pre-existing obligation. As a result, in the Special Rapporteur's view, it did not fall within the purview of the topic.

508. As regards unilateral acts formulated by international organizations, the Special Rapporteur pointed out that they were not included in the Commission's mandate which was confined to unilateral acts by States. However, the topic should also cover unilateral acts formulated by States and addressed to international organizations as subjects of international law.

509. The Special Rapporteur further pointed out that although acts relating to estoppel could be categorized as unilateral acts in formal terms, they did not of themselves produce effects. They depended on the reaction of other States and the damage caused by a State's primary act. There was certainly a close connection between the two. A State could carry out or formulate a unilateral act that could trigger the invocation of estoppel by another State

that felt it was affected. Yet it was a different kind of act because, unlike a non-treaty-based promise, a waiver, a protest or a recognition, it did not of itself produce effects, i.e. it did not come into existence solely through its formulation but depended on the reaction of the other State and the damage it caused, conditions that jurists viewed as a prerequisite for the invocation of estoppel in a proceeding.

510. Concerning the relationship between unilateral acts and reservations and interpretative declarations, the Special Rapporteur distinguished two questions: first, the unilateral character of the act whereby a reservation or interpretative declaration was formulated; and secondly, whether the type of unilateral act with which the Commission was concerned could give rise to reservations or interpretative declarations. The latter question he proposed to take up at the next session. As to the former question, he was of the view that the act whereby a reservation or interpretative declaration was formulated was plainly a non-autonomous unilateral act by virtue of its relationship with a pre-existing treaty. It was therefore covered by existing rules, as reflected in the 1969 Vienna Convention on the Law of Treaties and fell outside the purview of this topic.

511. Referring to the draft articles contained in his second report, the Special Rapporteur pointed out that, in their present form, they merely intended to serve as a basis for discussion.

512. Article 1, on the scope of the draft was based largely on the 1969 Vienna Convention on the Law of Treaties. It spoke of legal acts, thereby excluding political acts, a difficult distinction the Commission had already discussed. The Special Rapporteur said that he had tried in the commentary to reflect a question that had arisen in the context of the United Nations Conference on Disarmament, namely whether unilateral declarations formulated by nuclear-weapon States and known as negative security guarantees were political declarations or unilateral legal acts. Such declarations were unilateral and of joint origin because, although formulated by means of separate acts, they were virtually identical. They were also formulated well-nigh simultaneously and, in some cases, in the same context, i.e. at the Conference on Disarmament.

513. Non-nuclear-weapons States maintained that they were political declarations and should be reflected in a legal document to be really

effective, since, in their view, the undertakings of the nuclear-weapons States should proceed from multilateral negotiations in the framework of the Conference. The Special Rapporteur was inclined to consider that they were genuine declarations or acts that were legally binding for the States concerned. The fact that they were vague and subject to conditions did not necessarily mean, in his view that they were not legal. They were, however, inadequate in terms of the expectations of non-nuclear-weapon States.

514. However, the Special Rapporteur also thought that, if they were legal, such declarations were not unequivocally autonomous inasmuch as they could be linked to existing treaties concerning nuclear-weapon-free zones. For example, Protocol II to the Treaty of Tlatelolco of 14 February 1967 specified the guarantees to be provided by nuclear Powers to the effect that they would not use or threaten to use nuclear weapons against States parties to the Treaty. Protocol II to the Rarotonga Treaty of 6 August 1985 contained a similar clause.

515. Article 1 also stated that the acts concerned had international legal effects, a question that had already been thoroughly debated. Unilateral acts of internal scope would not be covered by the draft.

516. Article 2, which defined a unilateral legal act, was closely related to article 1. The Special Rapporteur had included the word "declaration" in brackets because he did not wish to impose it, although he was personally convinced that it constituted the act to be regulated. It was an issue for the Commission to decide.

517. Article 3, concerning the capacity of States to formulate unilateral legal acts, was based to a large extent on the wording of article 6 of the 1969 Vienna Convention on the Law of Treaties and the discussion preceding its adoption, an article which applied only to States and not to federal entities. Although recent developments in international action by decentralized federal States might favour its extension to federal entities, it was unlikely that such entities could formulate declarations or unilateral acts that would entail commitments at that level. Only the State, as an administrative political unit, was capable of incurring international unilateral obligations.

518. Article 4 was based on article 7 of the 1969 Vienna Convention. The Special Rapporteur indicated that a unilateral act, like all legal acts by a State, had to be formulated by a body possessing authority to act on behalf of

the State in the sphere of international law. In other words, for a unilateral act to produce international legal effects, it would have to be formulated by a body possessing the authority to engage the State in its international relations. As the 1969 Vienna Convention indicated, such representatives of States were persons who, in virtue of their functions or other circumstances, were empowered to engage the State at the international level. The phrase "in virtue of their functions" must be understood as relating to representatives who were deemed by the doctrine, international practice and jurisprudence to be empowered to act on behalf of the State with no need for additional formalities such as full powers. Such representatives were Heads of State, Heads of Government and ministers for foreign affairs. International courts had enshrined the principle, for example, in the Legal Status of Eastern Greenland case and, more recently, in the Gulf of Maine case.

519. The Special Rapporteur pointed out that the intention of the State that formulated the act and the good faith that should apply in international relations made it possible to assume that other representatives could also engage the State without the need for special powers, and that was clearly shown in international practice. He was referring to documents signed by ministers of education, health, labour and trade following official meetings which established programmes of cooperation and assistance or even more specific commitments. Such acts were often called agreements, memoranda of understanding, communiqués or declarations, but whatever the name they had legal value and could produce specific legal effects by establishing rights and obligations. Representatives of States were usually officials in the strict sense of the term, but they could also be individuals with a different status, persons with implicit powers granted to represent the State in a specific field of international relations, such as special commissioners, advisers and special ambassadors. For example, in respect of the management or use of common spaces, particularly among neighbouring States, ministers of the environment and public works and commissioners for border zones could make commitments on behalf of the State through the formulation of autonomous unilateral acts.

520. In the view of the Special Rapporteur, although the above considerations were important, given the need for stability and confidence in international

relations some restrictions should be applied. Certain categories of individuals, such as technicians, should not be empowered to engage the State internationally. The issue had been examined not only in the doctrine but also by international courts, including the International Court of Justice in its relatively recent decision in the Gulf of Maine case.

521. One important question, in the view of the Special Rapporteur, was whether all declarations and legal acts produced effects at the time they were formulated, regardless of the subject matter and the internal rules of the State, or had to be ratified, as was the case with treaties. A specific example was the formulation by a State's representative of a legal act on the delimitation or establishment of borders. The internal rules governing the expression of consent might make ratification necessary and even indispensable in such matters as territorial space and, in particular, the establishment of borders. In his opinion, not all unilateral acts could have immediate effect from the time of formulation, inasmuch as the rules applicable to expression of consent in treaty matters applied equally in respect of the formulation of unilateral acts. According to the 1969 Vienna Convention, heads of diplomatic missions could enter into commitments with the State to which they were accredited, as could heads of permanent missions to international organizations or delegations to international conferences, who had the capacity to act on behalf of the State and make commitments on its behalf. They were equally able to formulate unilateral acts.

522. The Special Rapporteur had doubts on whether it was necessary to include a provision on full powers, as in the Vienna Convention. His initial feeling was that it was not indispensable. For heads of diplomatic missions, heads of permanent missions to organizations and heads of delegations to international conferences full powers were implicit in the letters of accreditation which authorized them to act vis-à-vis the State, international organization or international conference to which they were accredited. Those powers were, of course, limited to a specific sphere of activities in respect of that State, organization or conference.

523. Article 5, on subsequent confirmation of a unilateral act formulated without authorization, was based on article 8 of the 1969 Vienna Convention and was basically concerned with the implicit or explicit confirmation of a unilateral act by a State. The Vienna Convention allowed for both implicit

and explicit confirmation. During the consideration of the draft article at the Vienna Conference, a broad formulation had been adopted. Venezuela had made a proposal that had not been taken up but which now appeared pertinent in respect of autonomous unilateral acts: that such acts should only be confirmed explicitly. In the Special Rapporteur's view, that seemed appropriate in view of the specific nature of such unilateral acts and the restrictive approach that should be applied to them.

524. Article 6 dealt with the expression of consent. The Special Rapporteur stressed that in order for a legal act to be valid under international law, it must be attributable to a State, the representative of that State must have the capacity to engage it at the international level, the act must be the expression of its will and free of irregularities and it must be formulated in the proper manner. It had to have a lawful object and must not derogate from prior obligations. Article 6 referred specifically to obligations: the State must not be able to acquire rights through its acts and, conversely, it must not be able to place obligations on other States without their consent. Intention was fundamental to the interpretation of the act. Under article 31 of the Vienna Convention, the context for the interpretation of an act comprised, in addition to the text, its preamble and annexes, a whole series of acts carried out by the State before, during and after the formulation of the act.

525. Article 7 brought together the causes of invalidity of a unilateral act, which were nearly identical to those applied in the law of treaties, although they had been ordered somewhat differently for ease of consultation. Subparagraph 1 referred to an error of fact or a situation which was assumed by the State to exist at the time when the act was formulated formed an essential basis of its consent. Subparagraph 2 stated that invalidity could be invoked if the State had been induced to formulate an act by the fraudulent conduct of another State. Other causes mentioned for invoking invalidity were corruption of a State's representative, acts or threats directed against a representative and conflict of the unilateral act with a peremptory norm of international law.

526. The Special Rapporteur indicated that for next year, he proposed to address extremely important and complex issues such as the observance,

application and interpretation of unilateral acts and whether a State could amend, revoke or suspend the application of one unilateral act by formulating another.

2. Summary of the debate

527. Members generally welcomed the second report of the Special Rapporteur, and appreciated the wide ranging number of issues therein dealt with which clearly pinpointed the main questions needing to be addressed. They also underscored the usefulness of the topic and the need for its codification and progressive development. Unilateral acts, it was said, were the most common means of conducting day-to-day diplomacy and there was uncertainty, both in the literature and in practice, regarding the legal regime applicable to them. The great variety of such acts was also stressed. As it was the function of international law to ensure stability and predictability in international relations, some regime was needed in order to prevent unilateral acts from becoming a source of disputes or conflicts. In one view, however, the topic was not yet ripe for codification or progressive development.

528. As regards the general scope of the topic, remarks were made in connection with acts related to international responsibility, unilateral acts of international organizations and estoppel.

529. In connection with unilateral acts which gave rise to international responsibility, members generally agreed with the Special Rapporteur that such acts fell outside the topic's purview since they were covered by the State responsibility topic. In one view however, the Commission might wish to consider cases in which a unilateral act might produce legal effects towards one State while at the same time being an infringement of an obligation towards another State. One example would be premature recognition by one State which was only "in the making" and would produce an infringement of an obligation towards the sovereign State.

530. As regards unilateral acts of international organizations, it was generally agreed that, at this stage, they should not be included in the topic's scope, not so much for theoretical reasons but because their consideration would introduce a further layer of complexity in an already sufficiently complex matter. The special character and purpose of such unilateral acts might require that separate rules should be applicable to them. They could therefore be addressed separately, at a later stage, after

the conclusion of the consideration of the unilateral acts of States. This, of course, did not mean that unilateral acts of States addressed to international organizations, or unilateral acts of States formulated in the framework of an international organization or of an international conference should not be considered under the present topic.

531. Divergent views were expressed concerning the advisability of including estoppel within the topic's scope. In support of the Special Rapporteur's position that it should not be included a view was expressed that the characteristic element of estoppel was not the conduct of the State in question but the reliance of another State on that conduct. While a unilateral act of the State produced a positive result with a clear intention on the part of the State to be bound by it, the unilateral statement creating the estoppel produced a negative result which was basically not intended by the author, although the other interested party could seize the opportunity to benefit from it by using the plea of estoppel. Consequently, one aspect of the definition of an autonomous unilateral act of a State, namely the intention of the State to produce international legal effects, was missing in the unilateral statements that gave raise to the plea of estoppel. In estoppel there was no creation of rights or obligations; rather, it became impossible to avail oneself of already existing rights and obligations in the context of a given proceeding.

532. Other members, however, stressed the need for considering estoppel within the topic's scope. In their view, it was not possible to exclude it on the pretext that acts giving rise to an estoppel were not autonomous unilateral acts. Although in common law countries, estoppel belonged in procedural law, in international law it could not simply be reduced to a procedural principle and be left out of the draft. In international law, estoppel was one of the consequences of the principle of good faith, a principle which governs the rules applicable to the legal effects of unilateral acts. While all cases of estoppel did not arise from positive unilateral acts, some of them did and consequently, such acts deserved to be studied. The task of the Commission was to rationalize and make sense of two different legal traditions which had converged in present day international law: the romanist doctrine of the binding effect of unilateral promises and

the common law tradition which did not recognize such binding effect but which, in order to fill the gap, had recourse to the doctrine of estoppel as a corollary of the principle of good faith.

533. In connection with the approach to the topic, general remarks were made particularly as regards the parallelism between the proposed draft articles and the Vienna Convention on the Law of Treaties, as well as on the need for further taking into account State practice in the field of unilateral acts.

534. Several members were of the view that the proposed draft articles followed too closely the articles of the 1969 Vienna Convention on the Law of Treaties. They did not believe that a provision included in the Vienna Convention could automatically be transferred *mutatis mutandis* to the draft articles on unilateral acts, because of the different nature of these acts as against treaties. Many rules contained in the Vienna Convention owed their existence to the meeting of wills of States parties to a treaty, an element which was absent from unilateral acts.

535. Other members disagreed. They thought that the 1969 Vienna Convention on the Law of Treaties was a very helpful guideline. In one view, the Special Rapporteur's report had not followed it close enough. In another view, the Special Rapporteur should take into account not only the 1969 Vienna Convention on the Law of Treaties but also the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. It was also said that with the exception of the problem of the invalidity of unilateral legal acts, many procedural and other relevant matters were not addressed in the present draft. For these cases, it would seem necessary to follow the provisions of the law of treaties and consider such matters as rules of interpretation, modification, suspension, termination, etc.

536. Several members maintained that the Special Rapporteur's report lacked sufficient support in State practice. With the exception of some cases from the International Court of Justice, it did not buttress its proposed draft articles with instances or examples taken from the practice of States. The suggestion was made that the Secretariat could produce a representative compilation of State practice grouped under the various categories of unilateral acts in order to help the Special Rapporteur fill that lacuna.

537. As regards article 1 on the scope of the draft articles, there was an acknowledgement that the Special Rapporteur had sought to restrict the scope of the topic to unilateral acts of a strictly juridical nature as opposed to acts of a political nature. However, the formulation he provided had some shortcomings due partly to drafting reasons and partly to the inherent difficulty in distinguishing between legal and political acts.

538. Concerning the drafting aspects of the provision, the suggestion was made that the legal nature of the act arose not so much from the fact that they produce legal effects but from the fact that the State formulating it purported to produce legal effects and that the drafting should be amended accordingly. Another remark was that the word "legal" rather than applying to the act itself should refer to the effects that it purported to produce. It was also suggested that perhaps the word effects could be clarified by speaking of "rights and obligations".

539. In the view of some members, the article, as presently drafted, would also cover unilateral acts which could help in the creation of custom which was an aspect not included within the Commission's mandate on the topic. Other members thought that this concern was unjustified. It was really impossible to know whether a unilateral act would lead to the creation of a new rule of customary international law or whether it would have some effect on existing customary international law. Consequently, it was important to deal with unilateral acts irrespective of whether they had any effect on customary law.

540. As regards the difficulties inherent in distinguishing a legal act from a political act, the view was expressed that the true criterion of distinction was the intention of their authors. While the Special Rapporteur had indicated this criterion in the commentary to the draft article, it had not found its way into the text itself of the provision.

541. The point was also made that, while intention was indeed the key to distinguish between legal and political acts, unfortunately it could not always be discerned clearly in every instance. A case in point were the negative security guarantees to non-nuclear States formulated by nuclear Powers in the context of the Conference on Disarmament. Doubts had been expressed about the legal or political nature of such declarations. Some members pointed out that, in their view, the intention of the nuclear Powers

in formulating such guarantees was to create legal effects even if non-nuclear powers members of the Conference tended to consider them as political and not legal statements. This question was connected with other important issues related to unilateral acts, such as the role of the addressee vis-à-vis the creation of the effects intended by the act, whether the addressee could reject the legal effect intended to be in its favour as well as the question of the foundation of the binding nature of a unilateral act.

542. Article 2 which contains a definition of unilateral acts of States, was thoroughly examined by members of the Commission and several of its constituent elements were commented upon. Some members expressed their strong reservations concerning the inclusion of the bracketed word "declaration" in the definition and their opposition to substituting the word "declaration" for the word "act". In their view, the form and the contents of unilateral acts were inseparable and the formal approach to the topic consisting in dealing only with the "instrumentum" and not the "negotium" of the act was unconvincing. In their view, the goal of the codification of the topic should be to bring the diversity of unilateral acts into the unity of a few rules applicable to all of them.

543. Several members were also opposed to the categorization of the acts covered by the definition of article 2 as "autonomous". In their view, the Special Rapporteur had too restricted a concept of the scope of the topic which could not be reduced to acts which, by themselves, created international legal effects without any relation to a pre-existing treaty or customary norm. If this were to be the case, these members argued, the topic would lose a great part of its usefulness and interest. In their view, while acts which were governed by a set of specific rules, such as reservations to treaties, could be excluded from the scope of the topic, acts which were carried out in implementation of or as to particularization of existing conventional or customary norms should not. Other members felt that the introduction of the notion of autonomy, as understood by the Special Rapporteur, in the definition of a unilateral act, served a useful purpose in order to delimit an otherwise extremely vast field of study.

544. Concerning the word "unequivocal" referred to the expression of will of the State in the definition proposed by the Special Rapporteur, the remark was made that it should rather refer to the intention of the State. It was also

suggested that such word should be deleted since it did not adequately reflect the practice of States in the formulation of unilateral acts and in the conduct of their foreign policy.

545. Members of the Commission were of the view that the requirement that the unilateral act should be formulated "publicly", as contained in the definition proposed by the Special Rapporteur, was inappropriate. In this view, the real requirement was that the act, in order to produce effects, should be known by its addressee.

546. A view was expressed to the effect that the possibility of joint or collective unilateral acts, which was recently contemplated in the definition proposed by the Special Rapporteur should be the subject of some explanation in the commentary to the provision, in particular the distinguishing features, if any, between a joint unilateral act and a treaty.

547. As regards the last component of the definition proposed by the Special Rapporteur, namely "with the intention of acquiring international legal obligations", the remark was made that through unilateral acts, rights could also be acquired or at least maintained. The proposed article seemed to have in mind only the case of promise, but other unilateral acts, such as protest or even recognition were susceptible of creating or maintaining rights. Consequently, it would be more appropriate to speak of the creation of legal effects. It was noted, in this connection, that "effects" was the word used in article 1. Furthermore, it was suggested that the most appropriate verb to use in connection with obligations was not "to acquire", but rather "to assume" or "to incur".

548. The following additional suggestions were made: that article 2 should speak of unilateral acts "in whatever form"; that article 2 should be followed by another article stating that this article was without prejudice to other unilateral acts not covered by the scope of the draft articles (along the lines of article 3 of the 1969 Vienna Convention); and that articles 1 and 2 could perhaps be merged.

549. Article 3 on capacity of a State to formulate unilateral acts was generally considered acceptable, subject to some drafting suggestions such as the deletion of the adjective "legal" concerning unilateral acts and the addition of the words "for the purposes of the present draft articles" at the beginning of the article.

550. As regards article 4 on representatives of a State for formulating unilateral acts, some members felt that it followed too closely article 7 of the Vienna Convention on the Law of Treaties and that its contents were not sufficiently supported by State practice. Other members however, felt that this was an instance in which the analogy with the Vienna Convention was fully justified. The point was made in this connection that the range of persons formulating unilateral acts tended in practice to be wider than that of persons empowered to conclude treaties but that point was adequately covered by paragraph 2 of the proposed article. While in one view, paragraphs 2 and 3 could be deleted since Heads of State, Heads of governments and Ministers for Foreign Affairs were the only State officials with the capacity to commit the State internationally without having to produce full powers. Another view felt that such persons were often not the most appropriate to commit the State unilaterally; they should perform a role of representation and leave the definition of the content of their declarations to other officials.

551. The view was also expressed, as regards paragraph 3 of the draft article, that it was doubtful that heads of diplomatic missions or the representatives accredited by a State to an international conference or to an international organization had the power to bind a State unilaterally. Practice showed that this power was not normally included in the full powers of such persons.

552. Article 5 on the subsequent confirmation of a unilateral act formulated without authorization was also the subject of some remarks. In one view, the Special Rapporteur's report did not reflect enough State practice to support the formulation of the article. Another view held that express confirmation was not necessarily required and that, often, tacit consent was generally considered to suffice. It was also pointed out by some members that the reference of the draft article to article 7 on grounds for invalidity was not appropriate, particularly since some of the grounds therein contemplated, such as paragraph 6, were not susceptible of later confirmation. In this view, the reference should rather be to article 4 which dealt with the representatives of a State for the purpose of formulating unilateral acts. As regards the French version of the article, a suggestion was made to replace the expression "sans autorisation" by the words "sans habilitation".

553. Article 6 on the expression of consent was found acceptable by a number of members. Some other members found that the report of the Special Rapporteur did not reflect enough State practice to justify its inclusion. They thought the draft article could be deleted without prejudice to the draft as a whole. Some suggestions were made concerning its wording. The words "consent of a State to acquire an obligation" and "representative" were considered, in one view, to be too closely modelled on the Law of Treaties. It was also suggested that the word "acquire" might be replaced by the words "incur" or "assume". The words "unvitiated declarations" were also questioned. One view pointed out that two additional issues should be dealt with in the context of article 6. One issue was the role of silence in the possible assumption of international obligations, a role which had been underscored by a number of judicial and arbitral cases. Another issue was the legal effect of the individual withdrawal by one of the authors from a previous joint statement.

554. Speaking generally on article 7 dealing with invalidity of unilateral acts, one view felt that it was too closely modelled on the relevant provision of the 1969 Vienna Convention on the Law of Treaties. On the other hand, some other members felt that it did not follow close enough articles 48 to 53 of that Convention. Another view held that it was too early to assess the full implications of the draft article since this provision should be evaluated with utmost care in the light of the full context of the draft articles.

555. On paragraph 1, dealing with error of fact, a view was expressed to the effect that it could not be applied in the same manner as in the Law of Treaties. In this view, for a State committing an error when formulating a declaration it should be easier to be able to correct that error than it was for a State making an error at the time of adopting a treaty. On paragraph 2, concerning fraud, and in particular on the comment by the Special Rapporteur that fraud could be committed by omission, the same view held that this might encroach on certain accepted ways whereby States led their foreign policy and convinced other States to join in that policy.

556. Referring to paragraph 3 dealing with the corruption of the representative of a State, the view was held that this was an interesting addition to existing international law, in which the influence of

Latin America could be detected. It was a necessary provision, but it needed to be explained in greater detail in the article itself and in the commentary.

557. General support was expressed for paragraph 6 on acts conflicting with a peremptory norm of international law, although it was felt that the paragraph should follow more closely the corresponding provision of the 1969 Vienna Convention on the Law of Treaties. Attention was also drawn to a discrepancy in the French version which translated the English word "formulation" by the word "accomplishment". It was also suggested that the Special Rapporteur should take into account any reformulation of the terms "peremptory norm" in the context of the draft articles on State responsibility.

558. Different views were expressed as to whether a unilateral act would be valid if formulated in contradiction with a norm of general international law. In the view of some members, such act would be invalid and such a ground of invalidity should be included in article 7. In the view of some other members, a unilateral act could depart from customary international law, but such an act could not produce legal effects if it was not accepted by the addressee States. The problem was one of legal effects rather than invalidity. However, even the view that considered unilateral acts conflicting with any norm of general international law as invalid, maintained that unilateral acts designed to bring about a change in existing international law - President Truman's declaration on the continental shelf in 1946 being one example - represented a separate problem that the Special Rapporteur ought perhaps to consider.

559. As regards paragraph 7 on violation of a norm of fundamental importance to the State's domestic law, one view held that it should follow more closely article 46 of the 1969 Vienna Convention on the Law of Treaties. Another view, however, thought that this norm, in the case of unilateral acts, should be more flexible than the one contained in that provision.

560. A suggestion was also made to the effect that article 7 should contain an additional ground of invalidity, namely unilateral acts formulated in violation of a United Nations Security Council resolution adopted under Chapter VII of the Charter, for example an act of recognition adopted in violation of a Security Council resolution which called on members not to recognize a particular entity as a State.

561. Some members commented on the paragraphs that the Special Rapporteur, in Chapter VIII of his report, devoted to reservations and conditions in relation to unilateral acts and to the non-existence of unilateral acts.

562. The Special Rapporteur in his report seemed to contemplate the possibility that a State, when formulating a unilateral act, might also formulate a reservation. Some members felt that to introduce the notion of reservation in connection with unilateral acts was a source of great confusion: a unilateral act could not be subject to reservations on the part of the State author of the act. It was clear that the addressee of the act could accept it subject to certain conditions. But although this acceptance and these conditions tended to bilateralize the relation thus created, it was still better not to apply the term "reservations" in connection with unilateral acts. This, for rigorous terminological reasons, and in order to avoid confusions.

563. On the other hand, the same members stressed that a unilateral act could perfectly be subject to certain conditions by the author of the act without thereby placing the act in the field of the Law of Treaties.

564. As regards the concept of "inexistence of a unilateral act" referred to by the Special Rapporteur, a view was expressed that such a concept should be better explained lest it might lead to a confusion with the concept of illegality of an act.

565. The Special Rapporteur, summing up the debate, recalled that the topic under discussion already had a certain history, the Commission having adopted a decision in 1997 setting up a working group which had produced some broad guidelines, and the first report on the basic aspects of unilateral acts of States, i.e. on their definition and constituent elements, having been published in 1998. This history, however, was not always taken into account by some members.

566. Issues which seemed to have been settled at the 1998 session had been brought back for discussion, in particular that concerning the relationship between a legal unilateral act and the formation of custom. It was precisely in that context that the question of an act's autonomy arose. For the Special Rapporteur that autonomy had two aspects: autonomy with regard to rules, and existential autonomy, meaning that an act was carried out whatever the reaction of its addressee. In truth, no act was really autonomous, in

that it always came within the realm of law. On the other hand, it was evident that a unilateral act became "bilateralized", so to speak, once it was recognized by another State. That did not prevent it from existing as soon as it was formulated, independently of such recognition.

567. The 1969 Vienna Convention on the Law of Treaties constituted a very important point of reference for the work on unilateral acts. The 1986 Convention, on the other hand, was a by-product of the former.

568. In this connection it was worth noting that the ways of expressing consent and the grounds for invalidity contemplated in the 1969 Vienna Convention seemed to be fully applicable to unilateral acts of States. One member had envisaged another cause of invalidity, namely the conflict between a unilateral act and binding decisions of the Security Council. It was an interesting and constructive idea worthy of further examination.

569. One member had referred to a situation involving silence and assent on the part of the addressee State. In the Special Rapporteur's view, silence was not strictly a legal act, although it produced legal effects. The element of intent was missing. A great deal of jurisprudence existed on the matter. It was an issue that would require further work aimed at excluding from the scope of study everything that did not fall precisely within the definition given at the beginning.

570. Another member had spoken of the difference that existed between a legal act and a political act. He seemed to believe that any act was political and that certain political acts were legal. The classic example concerned the negative guarantees given by the nuclear powers to non-nuclear-weapons States. The topic was vast. Even its delimitation was difficult, as it was impossible, without interpreting the author's intentions, to draw a distinction between a legal act and a political act.

571. For some members the definition of a unilateral act given in article 2 was too restrictive because it stated simply that a unilateral act was formulated "with the intention of acquiring international legal obligations". The Special Rapporteur wondered whether one could maintain, for example, that a blockage imposed by State A on State B established obligations for State C? A declaration of neutrality posed a similar problem: it only had effects for other States if they confirmed it, either by their conduct or through a formal

act. The Special Rapporteur had already advised against referring in the draft articles to acts by which a State incurred obligations on behalf of a third party State, which were the concern of conventional law.

572. Several drafting proposals had been made. Some members had suggested combining articles 1 and 2. There was no doubt that the two provisions, one concerned with the scope of the articles and the other with the definition of unilateral legal acts of States, were, of necessity, complementary. The Special Rapporteur preferred to keep the two provisions separate, and felt that in any event the most important consideration was to maintain the logical connection linking one to the other.

573. A proposal had also been made to include in the draft a provision similar to article 3 of the Vienna Convention of 1969, referring to unilateral acts other than those covered by the draft articles. In the Special Rapporteur's view, such a provision was understandable in the Vienna Convention, which was concerned not with conventional law in general but with written treaties between States, and thus had to allow for conventional acts with which it was not specifically concerned. In the present case, however, the definition given in article 1 covered all unilateral acts having legal effects with the exception of acts of international organizations.

574. Questions had also been raised about the notions of publicity and notoriety. The Special Rapporteur regarded the two terms as virtually synonymous, although one could speak of notoriety in relation to a statement erga omnes. Publicity had to be understood in connection with the State to which the act in question was addressed, which must be aware of the act in order for it to produce effects. The publicity for an act should thus be regarded as one of its constituent elements.

575. As regards the use of the term "international community" in article 2, the Special Rapporteur said that international life was evolving towards the establishment of an international society, a phenomenon he regarded as inevitable. As evidence, there were the extensive areas of common interest which had emerged, for example human rights or the environment and which no longer came under exclusive national jurisdiction. The issue was a sociological one that certainly required further consideration, and whose importance was highlighted by the growing influence of multilateralism in the modern world.

576. In conclusion, the Special Rapporteur pointed out that there was a need to set up a working group that would define unilateral acts of States and clarify their constituent elements. There was also a need to become better informed about the practice of States and how they viewed, received and responded to unilateral acts. The working group could have, as one of its main tasks, the drafting of a questionnaire to be sent to States to inquire about their practice regarding unilateral acts.

3. Establishment of a Working Group

577. As a result of the discussion in the Commission's Plenary of the second report of the Special Rapporteur on the topic, the Commission, at its 2594th meeting on 25 June 1999, decided to reconvene the Working Group on Unilateral Acts of States. At its 2596th meeting, on 2 July 1999, the Commission decided to appoint the Special Rapporteur, Mr. Victor Rodriguez-Cedeño, as Chairman of the Working Group and to transmit to it his second report together with the comments made in Plenary. 526/

578. The Working Group held three meetings between 7 and 13 July 1999 and submitted a report to the Commission.

579. At its 2603rd meeting on 15 July 1999 the Commission considered the report of the Working Group which was introduced by its Chairman.

580. After an exchange of views, the Chairman introduced some amendments to the report, on behalf of the Working Group. At the same meeting the Commission adopted the report of the Working Group as amended by the Commission.

581. The task of the Working Group was (a) to agree on the basic elements of a workable definition of unilateral acts as a starting point for further work on the topic as well as for gathering relevant State practice, (b) to set the general guidelines according to which the practice of States should be gathered and (c) to point the direction that the work of the Special Rapporteur should take in the future.

582. As regards the first point indicated in the paragraph above, doubts were expressed concerning some of the elements contained in the definition of unilateral acts provided by the Special Rapporteur in his second report.

526/ For the composition of the Working Group, see para. 10 of Chapter I (Introduction).

583. The word "legal" qualifying the expression "unilateral act" was generally considered unnecessary to the extent that it would be clearly established in the definition that the unilateral acts under study by the Commission were those purporting to create "international legal effects" and not merely declarations of a political nature.

584. The adjective "unequivocal" applied to the unilateral act seemed to imply the requirement of an element of clarity in the formulation of the act; this was generally considered as unduly restricting the scope of the topic and as a source of potential problems. International practice showed that unilateral acts were often not a model of clarity but that did not necessarily mean that they were devoid of legal effects. The interpretation of unilateral acts was precisely one of the aspects which had to be tackled by the Commission in the context of the present topic.

585. The element of "publicity" as formulated in the Special Rapporteur's definition was also questioned. It was noted that this element, understood as the use of mass-media to make the act widely known to the international community, might be required in some very specific kind of unilateral acts such as those dealt with by the International Court of Justice in the Nuclear Tests cases, but not in all unilateral acts. It was felt that, as a general requirement in the definition of a unilateral act, "publicity" could only be understood in the sense that they should be notified or otherwise known to the addressee of the act.

586. The concept of "international community as a whole" as a possible addressee of unilateral acts, as contained in the Special Rapporteur's definition, was also questioned. Doubts were expressed as to whether "the international community as a whole" could be considered a subject of international law and, consequently, as susceptible of being a holder of international rights or obligations.

587. The element "with the intention of acquiring international legal obligations" contained in the Special Rapporteur's definition was also questioned as unduly restricting the topic. Unilateral acts could also purport to acquire or maintain rights. Some members suggested the inclusion of the words: "with the intention to create a new legal relationship". It was noted, however, that the word "new" was not accurate since the purpose of some acts was to maintain certain rights rather than creating new ones

(protest). Furthermore, the effect of certain acts could be the absence of a legal relationship. It was generally agreed that this element of the definition should be reformulated as "intention to produce legal effects on the international plane".

588. Divergent views were expressed on the element of "autonomy" of the act included in the Special Rapporteur's definition. Some members felt that the inclusion of this element, as understood by the Special Rapporteur, would reduce too much the topic's scope. All unilateral acts could be said to have their foundation either on conventional or general international law. Acts which could reasonably be excluded from the Commission's study were those subject to a special legal regime. Other members were sympathetic to the inclusion of this element of autonomy as an appropriate way of delimiting the topic in order to exclude unilateral acts which were subject to special treaty regimes. It was agreed to exclude from the study unilateral acts subject to special legal regimes such as, inter alia, those based on conventional law, reservations to treaties and declarations accepting the jurisdiction of the International Court of Justice.

589. In the light of the preceding considerations, the Working Group agreed that the following concept could be taken as the basic focus for the Commission's study on the topic, and as a starting point for the gathering of State practice thereon:

> "A unilateral statement by a State by which such State intends to produce legal effects in its relations to one or more States or international organizations and which is notified or otherwise made known to the State or organization concerned."

It was also noted in the Working Group that a unilateral statement could be made by one or more States jointly or in a concerted manner.

590. The Working Group also considered the second point indicated in paragraph 581 above, namely the setting of general guidelines according to which the practice of States should be gathered.

591. The suggestion was made that the Secretariat should prepare a typology or catalogue of the different kinds of unilateral acts to be found in State practice. It need not be exhaustive but sufficiently representative of the wide variety of that practice.

592. It was noted, however, that the present sources where such practice could be found were not representative enough, since only some States, and not necessarily from all regional groups or legal systems, possessed up-to-date digests of their international practice. It was suggested that one way of supplementing such sources was for members of the Commission to cooperate with the Special Rapporteur by providing him with materials sufficiently representative of the practice of their respective countries.

593. It was agreed that the Secretariat in consultation with the Special Rapporteur, should elaborate and send to governments, by October 1999, a questionnaire for possible reply within a reasonable deadline, requesting materials and inquiring about their practice in the area of unilateral acts as well as their position on certain aspects of the Commission's study of the topic.

594. The questionnaire should start from the concept of unilateral acts reproduced in paragraph 589 above. It should also refer to specific kinds of unilateral acts, such as promise, protest, recognition, waiver or notification concerning which materials and information would be sought. It should also further inquire about the practice of States concerning the following aspects of the act:

- who has the capacity to act on behalf of the State to commit the State internationally by means of a unilateral act;
- to what formalities are unilateral acts subjected: written statements, oral statements, context in which acts may be issued, individual or joint acts;
- possible contents of unilateral acts;
- legal effects which the acts purport to achieve;
- importance, usefulness and value each State attaches to its own and other's unilateral acts on the international plane;
- which rules of interpretation apply to unilateral acts;
- duration of unilateral acts;
- possible revocability of an act.

Furthermore, the questionnaire could also contain some questions concerning the general approach or scope of the topic, such as: to what extent does the government believe that the rules of the 1969 Vienna Convention on the Law of Treaties could be adapted mutatis mutandis to unilateral acts.

595. It was agreed that the points listed in paragraph 594 are not exhaustive. The Secretariat, in consultation with the Special Rapporteur, could expand them or phrase them in a more appropriate manner.

596. The Working Group also was of the view that the presence of Legal Advisors of Foreign Ministries during the discussion of the Commission's report in the Sixth Committee could be utilized to draw their attention to the need for gathering State practice on this topic and the convenience that their respective governments respond to the above-mentioned questionnaire as soon as possible. In this connection, the presence of the Special Rapporteur on the topic during the Sixth Committee discussion could prove useful.

597. As regards the future work of the Special Rapporteur on the topic, he should continue, taking into account the relevant State practice, with the formulation of draft articles, including the possible reformulation, in the light of the comments made in the Commission, of the draft articles submitted in his second report, as well as with the examination of the specific areas related to the topic, such as interpretation, effects and revocability of unilateral acts.

CHAPTER IX

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (PREVENTION OF TRANSBOUNDARY DAMAGE FROM HAZARDOUS ACTIVITIES)

A. Introduction

598. At its forty-ninth session, in 1997, the Commission decided to proceed with its work on the topic "International liability for injurious consequences arising out of acts not prohibited by international law", dealing first with the issue of prevention under the subtitle "Prevention of transboundary damage from hazardous activities". 527/ The General Assembly took note of this decision in paragraph 7 of its resolution 52/156.

599. At the same session, the Commission appointed Mr. Pemmaraju Sreenivasa Rao Special Rapporteur for this part of the topic. 528/

600. At its fiftieth session, the Commission had before it the Special Rapporteur's first report (A/CN.4/487 and Add.1). The report reviewed the Commission's work on the topic of liability since it was first placed on the agenda in 1978, focusing in particular on the question of the scope of the draft articles to be elaborated. This was followed by an analysis of the procedural and substantive obligations which the general duty of prevention entailed. Having agreed on the general orientation of the topic, the Commission established a Working Group to review the draft articles recommended by the Working Group in 1996 in the light of the Commission's decision to focus first on the question of prevention. 529/

601. At its 2542nd meeting, on 5 June 1998, the Commission referred to the Drafting Commdraft articles proposed by the Special Rapporteur on the basis of the discussions held in the Working Group.

602. The Commission considered the report of the Drafting Committee at its 2560th to 2563rd meetings, on 12 and 13 August 1998 and adopted on first reading a set of 17 draft articles on prevention of transboundary damage from hazardous activities.

527/ Official Records of the General Assembly, Fifty-second Session, Supplement No. 10 (A/52/10), para. 168.

528/ Ibid.

529/ On the basis of the Working Group's discussions, the Special Rapporteur proposed a revised text for the draft articles (A/CN.4/L.556).

603. At its 2531st meeting, on 15 May 1998, the Commission decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2000.

B. Consideration of the topic at the present session

604. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/501), comprising five Sections. Sections I and II dealt with the questions raised in the 1998 report of the Commission on the nature of the obligation of prevention, the eventual form of the draft articles and the type of dispute settlement procedures that may be suitable for the draft articles as well as reaction by Governments to the report of the Commission during the Sixth Committee debate at the fifty-third Session of the General Assembly. Section III of the Special Rapporteur's report elaborated on the salient features of the concept of due diligence and ways in which that concept could be implemented in the light of State practice and doctrine. This section further identified the factors that are relevant in the enforcement of the duty of due diligence. Section IV reviewed the treatment of the concept of international liability in the Commission since the topic was placed on its agenda as well as negotiations on liability issues in other international forums. In the last Section, Section V of the report, the Special Rapporteur offered three options with respect to future course of action on the question of liability. The first option was to proceed with the topic of liability and finalize some recommendations, taking into account the work of the previous Special Rapporteurs and the text prepared by the Working Group of the Commission in 1996. The second option was to suspend the work on international liability, until the Commission finalizes its second reading of the draft articles on the regime of prevention. The third option was for the Commission to terminate its work on the topic of international liability, unless a fresh and revised mandate is given by the General Assembly.

605. As a matter of immediate focus for discussion, the Special Rapporteur requested comments, in particular, on the three options he had proposed in order to enable the Commission to take a decision with respect to its future work on the topic.

606. In response to this request, the Commission considered the report of the Special Rapporteur at its 2600th and 2601st meetings on 9 and 13 July 1999, focusing on the three options proposed by the Special Rapporteur.

607. Most of the members who spoke, opted for the second option proposed by the Special Rapporteur, i.e. deferring the consideration of the question of international liability until the Commission has completed the second reading of prevention.

608. On the basis of the discussion, the Commission decided to defer consideration of the question of international liability, pending completion of the second reading of the draft articles on the prevention of transboundary damage from hazardous activities.

CHAPTER X

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Programme, procedures and working methods of the Commission and its documentation

609. Having regard to paragraphs 9, 10 and 12 of General Assembly resolution 53/102 of 8 December 1998, 530/ the Commission considered the matter under item 10 of its agenda entitled "Programme, procedures and working methods of the Commission and its documentation" and referred it to the Planning Group of the Enlarged Bureau.

610. The Planning Group held four meetings: it had before it the section G of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-third session, entitled "Other decisions and conclusions of the Commission". 531/

1. Procedures and working methods of the Commission and its documentation

611. At its 2610th and 2611th meetings on 21 and 23 July 1999, the Commission considered and endorsed the Planning Group's report.

The General Assembly's requests

(a) The relations between the Commission and the Sixth Committee

612. In paragraph 10 of General Assembly resolution 53/102, the General Assembly:

> "Stresses the desirability of enhancing dialogue between the International Law Commission and the Sixth Committee, and in this context requests the Commission to submit any recommendations to that effect."

613. The Commission had already addressed this issue several times in the past, the last time being during its forty-eighth session in 1996.

614. The Commission started implementing what it had proposed in 1996 with respect to its relation with the Sixth Committee. 532/ Subsequently it

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530/ See paragraphs 612, 618, 633 below.

531/ Document A/CN.4/496, paras. 175-189.

532/ See Report of the International Law Commission on the work of its forty-eighth session, Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), para. 182.

expanded its practice of identifying issues on which comment is specifically sought by highlighting these issues in each session on a special chapter of its Report entitled "Specific issues on which comments would be of particular interest to the Commission". These issues are either of a general character or concern specific questions on which the views of Governments would be of great assistance to the Commission.

615. This presentation of specific issues has inter alia contributed to a more structured and focused debate within the Sixth Committee itself. The thematic presentation of the report by the Chairman of the Commission in two or three parts is another element of this process. This practice should be encouraged and further improved on for the sake of greater clarity of the exchanges between the Commission and the Sixth Committee. Another positive development which took place recently was the presence in the Sixth Committee - besides the Chairman - of several Special Rapporteurs who could thus proceed to a direct "dialogue" with the Sixth Committee whenever their topic was being discussed. This practice already proved to be useful and should therefore be maintained.

616. The indispensable part of the dialogue between the Commission and the Governments is the procedure of written comments by Governments in response to particular Commission requests. The Commission also authorizes the Special Rapporteurs to address questionnaires to Governments, when appropriate, seeking information or their views on a specific topic.

617. The Commission is however concerned that not a sufficient number of Governments reply to these requests for written comments or questionnaires. [533] It wishes to stress how important it is for the Commission to have the views of Governments from all parts of the world on various topics under consideration.

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[533] The number of Governments which provided such written comments or responses to questionnaires on some recent topics have been as follows: State responsibility, 19 (1998, 1999); Nationality in relation to Succession of States, 13; Reservations to Treaties, 33; Jurisdictional Immunities, 5; Diplomatic Protection, 3.

(b) The Commission's relationship with other bodies (within and outside the United Nations)

618. In paragraph 12 of its resolution 53/102, the General Assembly requested the International Law Commission "... to continue the implementation of article 16, paragraph (e) and article 26, paragraphs 1 and 2, of its Statute in order to further strengthen cooperation between the Commission and other bodies concerned with international law, having in mind the usefulness of such cooperation, and invites the Commission to provide the Sixth Committee with updated information in this regard at the fifty-fourth Session of the General Assembly".

(i) Consultations with scientific institutions and individual experts and international or national organizations

619. Article 16 (e) of the Commission's Statute provides that:

> "When the General Assembly refers to the Commission a proposal for the progressive development of international law, the Commission shall follow in general a procedure on the following lines:
>
> (...)
>
> (e) It may consult with scientific institutions and individual experts; these experts need not necessarily be nationals of Members of the United Nations. The Secretary-General will provide, when necessary and within the limits of the budget, for the expenses of these consultations of experts."

Article 26, paragraph 1 provides that:

> "The Commission may consult with any international or national organizations, official or non-official, on any subject entrusted to it if it believes that such a procedure might aid it in the performance of its functions."

620. At various occasions, the Commission has held consultations with individual experts on specific topics pursuant to decisions of the Commission or on the initiative of its individual members. Such consultations took different forms. 534/

534/ The examples in the past are numerous. The Commission or the Special Rapporteurs consulted with experts either in a "formal" way (as in the case of the delimitation of the territorial sea of two adjacent States where the Special Rapporteur met with a group of experts) or more informally (e.g. experts of the United Nations High Commissioner for Refugees offered their assistance to the Commission with regard to the topic "Nationality including Statelessness" in 1952; in 1960, the Commission invited professors of the Harvard Law School to comment on the draft on Responsibility of States being prepared under the auspices of that school).

621. Recent examples are consultations with experts of the United Nations High Commissioner for Refugees which took place in 1996-1997 with regard to the topic "Nationality in relation to succession of States", in the framework of the Working Group established by the Commission on that topic. Moreover, in this last case, the Commission benefited from the fact that two of its members had recently served as Rapporteurs of the Council of Europe on the topic "Effects of State Succession on Nationality". In relation to the Commission's work on State responsibility, study groups have been established by the Government of Japan, the International Law Association and the American Society of International Law, and they have provided useful feedback to the Commission and the Special Rapporteur.

622. For a number of years, the practice of annual meetings of the Commission with representatives and experts of the International Committee of the Red Cross has been established and is still continuing. In the course of these meetings, an exchange of views takes place on an agenda including both the current topics under consideration by the Commission but also issues of international humanitarian law. It should be mentioned that on some occasions (as for the preparation of the Draft Code of Crimes against the Peace and Security of Mankind) these exchanges of views have proved very valuable for the work of the Commission.

623. The Commission maintains close relations with academic institutions, universities, etc. which also provide an input to the Commission's reflection on certain topics. A recent example is the participation of the Geneva Institute for International Studies to the Commission's seminar held at the occasion of the fiftieth session, in 1998, during which a useful dialogue took place between scholars and the Commission concerning mainly topics on the Commission's agenda. 535/

624. In this context, the Colloquium on the Progressive Development and Codification of International Law held on 28 and 29 October 1997 should also be mentioned. It was organized by the Secretary-General of the United Nations

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535/ The proceedings of this seminar will be shortly published.

pursuant to General Assembly resolution 51/160 of 16 December 1996 to commemorate the fiftieth anniversary of the establishment of the Commission and demonstrated, if need be, the continuous and long-standing cooperation of the Commission with academic and scientific institutions, researchers and other experts from all over the world. In this case also the participants included members of the Commission, members of the academic community, diplomats and legal advisers of Governments and international organizations who held a fruitful and open dialogue. Another example of the exchanges between the Commission and the academic community is the recent (October 1998) colloquium of Aix-en-Provence on the codification of International Law organized by the "Société française pour le droit international", in the course of which again current and former members of the Commission and its Secretariat and academics exchanged their ideas on the topic of codification of international law. 536/

625. Along the same lines, the United Kingdom Study Group was organized under the auspices of the British Institute of International and Comparative Law as part of the British celebration of the Commission's fiftieth anniversary. The group considered the question of the Commission's future agenda and produced a report. 537/

626. Moreover numerous consultations also take place in an informal manner, especially in view of the personal contacts of many members of the Commission with scientific institutions. The practice of consultations which can take many forms should continue. The need for them, however, depends upon the consideration of particular topics involving specific technical issues for which the Commission would need the opinion of experts or specific agencies. The above examples should be viewed as concrete manifestations of an ongoing process of consultations, exchange of views and mutual information between the members of the Commission and scientific institutions, experts, professors of

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536/ The proceedings of the Colloquium were already published in June 1998 "Making better International Law: the International Law Commission at 50."

537/ The role and future of the International Law Commission (British Institute of International and Comparative Law, 1998).

international law, etc. The fact that this process is often informal should not detract from its intrinsic value in keeping the Commission abreast of new developments and trends in scholarly research on international law.

627. Finally, the financial implications - already present in article 16 (e) of the Statute - of formal consultations with scientific institutions and experts should not be overlooked. In its recent practice, the Commission had recourse to consultations which did not involve additional costs. It would not be realistic to advocate any further expansion and, in particular, institutionalization of consultations with scientific institutions and experts at a time of severe financial constraints in the United Nations resulting even in the curtailing of long-standing activities and programmes. The situation could undoubtedly be reviewed in the future in the hope of a less precarious financial situation of the Organization.

(ii) Distribution of documents of the Commission

628. Article 26, paragraph 2 of the Statute provides that:

> "For the purpose of distribution of documents of the Commission, the Secretary-General, after consultation with the Commission, shall draw up a list of national and international organizations concerned with questions of international law. The Secretary-General shall endeavour to include on this list at least one national organization of each Member of the United Nations."

629. The exchange and distribution of documents of the Commission follow the principles approved by the Commission in 1965. 538/ One of these principles requires that the *Yearbook* and documents should not normally be sent to individuals, but should rather be confined to organizations, institutes and libraries, in particular, law school libraries, which should be placed on the mailing list at the request of members of the Commission or of permanent missions to the United Nations. The current mailing list of documents of the Commission is composed of 161 organizations, libraries, etc. and 101 individuals, mostly former members of the Commission, judges at the

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538/ *Yearbook .... ILC*, 1965, vol. II, pp. 194-195. It should be noted that these principles concern the *additional* distribution of documents of the Commission, going *beyond* the usual distribution of all official documents of the United Nations.

International Court of Justice, law professors, etc. The Secretariat is currently reviewing this mailing list as it had done periodically in the past, with a view to updating it.

630. The "distribution of documents", according to article 26, paragraph 2 of the Statute aims mainly towards disseminating the Commission's documentation rather than constituting a flow of information between the Commission and other bodies. It should be noted that in practice, the amount of documentation received by the Commission from national or international organizations, scientific institutions, etc. has been rather low.

631. While in the past the provision of article 26 of paragraph 2 of the Statute was of great practical significance, with the growing use of electronic information and of computerization, the purpose of the above provision becomes to a large extent obsolete. Indeed, the International Law Commission Website was created by the Codification Division on the occasion of the Commission's fiftieth anniversary. The primary purpose of the Website is to disseminate information regarding the activities of the Commission to as wide an audience as possible, through the electronic medium. This Website includes, apart from general information on the history and composition of the Commission, on-line copies of the reports of the Commission, (starting in 1996) as well as of various other texts adopted by the Commission or based on its work. 539/

632. The Commission's interest in achieving a broad dissemination of its documentation is obvious. In particular, in view of the fact that some national institutions do not yet have an easy access to electronic information, it is desirable that respective Governments provide information which would allow the Secretariat to update the addresses of such institutions on the existing mailing list of the Commission while the developing and refining of the International Law Commission Website continues.

539/ Paragraph 15 of General Assembly resolution 53/102 refers to the International Law Commission's Website.

(c) Split session

633. The General Assembly, in paragraph 9 of its resolution 53/102, asked the International Law Commission to indicate the advantages and disadvantages of a split session.

634. The Planning Group established an informal working group 540/ which discussed at length this issue. It prepared a draft report on the matter which was ultimately incorporated in the Planning group's report and finally endorsed by the Commission.

635. The Commission recommends split sessions because it believes they would be more efficient and effective and facilitate the uninterrupted attendance of more members. The Commission does not believe there are any disadvantages to a split session but recognizes that budgetary considerations may be regarded as a factor. The Commission believes that this problem can, if necessary, be ameliorated and even reduced to minimal proportions. The Commission will continue to maintain a flexible need-based position on the duration and nature of its sessions.

(i) More efficient work

636. A split session would allow intra-sessional preparation to be carried out in a way that would make the second part of a split session more productive. For example, work completed in the Drafting Committee requiring the elaboration of commentaries would benefit by the preparation of commentaries in the interim. Problems which had arisen in the first part of the session, in either the Plenary or the Drafting Committee, could benefit from more focused consideration and informal exchanges (e.g. e-mail) among members and with the Secretariat than is the case at present. Special rapporteurs could have the opportunity to reflect on proposals or problems raised at the first part of the session without loss of focus caused by waiting a full year or the alternative need to give over hasty consideration and/or need to be absent from work on other topics to the Commission's loss while producing responses under time pressure. Finally, experience suggests that more intense and productive concentration is likely in two sessions with a pause for reflection in between them rather than one marathon session.

540/ It consisted of Mr. R. Rosenstock (Chairman), Mr J.C. Baena Soares, Mr. R.I. Goco, Mr. J.L. Kateka, Mr. G. Pambou-Tchivounda and Mr. C. Yamada.

(ii) Better attendance

637. Though members are well aware of their duties to attend, many members have over the years experienced major difficulties in squaring 12 straight weeks of the Commission with their other responsibilities. It is inherent in the nature of the experience and special qualifications needed for the ILC that the members will have other responsibilities and demands on their time that would make it easier for them to attend two shorter sessions rather than one 12-week session. It was the desire to attract highly active and busy experts from differing backgrounds that contributed to the decision not to make the Commission a full-time, year-round operation. Splitting the session will increase attendance and thus contribute to the original benefit perceived to flow from the nature of the Commission as a non-full-time responsibility for the members. Past experience (1998) with a split session supports this view.

(iii) Flexibility

638. The Commission will, of course, maintain flexibility with regard to the nature and duration of its sessions. While the workload for the last two years of its current quinquennium (2000 and 2001) will clearly require 12 weeks and benefit from split sessions, the Commission may be able to complete its tasks in a unitary session of 10 weeks as was the case in 1997 in the initial year of its five-year term.

(iv) Disadvantages

639. The members of the Commission do not believe there are any disadvantages to a split session. Any cost increase flowing from a split session should be more than offset by way of results-based analysis by increased productivity. At the same time, the members are well aware of the current need of the Organization to accommodate the split session within the existing budgetary level. The saving of the cost could be achieved, for example, by reorganizing its work programme, of a split session, so that one or two weeks at the end of the first part of the session and/or the beginning of the second part of the session could be devoted exclusively to the meetings which require the attendance of limited numbers of the Commission's members. The Commission would put into effect such arrangements already in the year 2000.

2. Long-term programme of work

640. At its current session, the Planning Group re-established the Working Group on the long-term programme of work to consider topics which might be taken up by the Commission beyond the present quinquennium.

641. The Working Group was chaired by Mr. Ian Brownlie and reported to the Planning Group. [541]

642. The Commission took note of the report of the Planning Group of last year in which it had identified the following topics as appropriate for inclusion in the long-term programme of work of the Commission: responsibility of international organizations; the effect of armed conflict on treaties; shared natural resources (confined groundwater and single geological structures of oil and gas); and expulsion of aliens. The Commission further took note that the Working Group on the long-term programme of work had examined a number of feasibility studies on various other topics and that it intends to complete its work at the next session of the Commission. The Commission decided that the Working Group on the long-term programme of work should be re-established at the next session to complete its task.

3. Work programme of the Commission for the remainder of the quinquennium

643. Recalling its work programme for the quinquennium, [542] the Commission reviewed the progress achieved, with respect to each topic, during the three first years of this quinquennium. It noted that substantial progress has been made in particular on the topics of "International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)" (completion of first reading of draft articles in 1998), "Nationality in relation to the succession of States" (completion of second reading of draft articles in 1999) and "State responsibility".

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[541] For the composition of the Working Group see paragraph 10 above.

[542] See _Official Records of the General Assembly, Fifty-second Session, Supplement No. 10_ (A/52/10), paras. 220-221.

644. The Commission took note of the recommendations on updating the work plan adopted in 1997 regarding respective topics for the remainder of the quinquennium as follows:

Work programme (2000-2001)

2000:

State responsibility

Third report of the Special Rapporteur (Part II of the draft articles and remaining issues).

International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)

Second reading of the draft articles on "prevention".

Third report of the Special Rapporteur.

Diplomatic protection

First report of the new Special Rapporteur.

Reservations to treaties

Fourth report (second part) of the Special Rapporteur (on formulation and withdrawal of reservations and interpretative declarations).

Fifth report (permissibility of reservations).

Unilateral acts of States

Third report of the Special Rapporteur.

2001:

State responsibility

Fourth report of the Special Rapporteur (other outstanding issues).

Adoption of the draft articles on second reading and commentaries thereto, and of the Commission's recommendation on the draft articles.

International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)

Fourth report of the Special Rapporteur. Conclusion of second reading of the draft articles on "prevention" and recommendation on the future of the topic "International liability".

Diplomatic protection

Second report of the Special Rapporteur.

Reservations to treaties

Sixth report (Effects of reservations and interpretative declarations).

Unilateral Acts of States

Fourth report of the Special Rapporteur.

B. Cooperation with other bodies

645. The Commission was represented at the 1999 session of the Inter-American Juridical Committee by Mr. Joao Clemente Baena Soares who attended the session and addressed the Committee on behalf of the Commission. The Inter-American Committee was represented at the present session of the Commission by Ambassador Luis Marchand Stens. Mr. Stens addressed the Commission at its 2573rd meeting on 18 May 1999 and his statement is recorded in the summary record of that meeting.

646. The Commission was represented at the 1999 session of the Asian-African Legal Consultative Committee, in Accra, by Mr. Chusei Yamada who attended the session and addressed the Committee on behalf of the Commission. The Asian-African Legal Consultative Committee was represented at the present session of the Commission by the Secretary-General of the Committee, Mr. Tang Chengyuan. Mr. Tang addressed the Commission at its 2576th meeting on 25 May 1999 and his statement is recorded in the summary record of that meeting.

647. The Commission was represented at the September 1998 session of the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe by Mr. Pellet who attended the session and addressed the Committee. The European Committee on Legal Cooperation and the Committee on Legal Advisers on Public International Law were represented at the present session of the Commission by Mr. Rafael Benitez. Mr. Benitez addressed the Commission at its 2604th meeting on 16 July 1999 and his statement is recorded in the summary record of that meeting.

648. At its 2585th meeting on 10 June 1999, Judge Stephen Schwebel, President of the International Court of Justice addressed the Commission and informed it of the Court's recent activities and of the cases currently before it. An exchange of views followed. The Commission finds it very useful and rewarding to continue this ongoing exchange with the Court.

649. On 7 July 1999, an informal exchange of views on various aspects of international humanitarian law was held between members of the Commission and members of the legal services of the International Committee of the Red Cross.

C. Date and place of the fifty-second session

650. The Commission agreed that its next session be split in accordance with its decision taken at the fiftieth session. The split session would be held in the United Nations Office at Geneva from 1 May to 9 June and from 10 July to 18 August 2000.

D. Representation at the fifty-fourth session of the General Assembly

651. The Commission decided that it should be represented at the fifty-fourth session of the General Assembly by its Chairman, Mr. Zdzislaw Galicki.

652. Moreover, at its 2611th meeting on 23 July 1999, the Commission requested Mr. Rodriguez-Coleño, Special Rapporteur on "Unilateral Acts of States" to attend the fifty-fourth session under the terms of paragraph 5 of General Assembly resolution 44/35.

E. International Law Seminar

653. Pursuant to General Assembly resolution 53/102, the thirty-fifth session of the International Law Seminar was held at the Palais des Nations from 14 June to 2 July 1999, during the present session of the Commission. The Seminar is intended for advanced students specializing in international law and for young professors or government officials pursuing an academic or diplomatic career or posts in the civil service in their country.

654. Twenty-three participants of different nationalities, mostly from developing countries, were able to take part in the session. 543/ The

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543/ The following persons participated in the thirty-fifth session of the International Law Seminar: Ms. Claudia Adeoussi (Benin); Ms. Ieva Bilmane (Latvia); Ms. Gabriela Carrillo Fraga (Ecuador); Ms. Polo Chabane (Lesotho); Mr. Warren Chik (Singapore); Mr. Alfredo Garcia Rosas (Mexico); Mr. Kokou Kpayedo (Togo); Ms. Tarja Langström (Finland); Mr. Yonesheng Li (China); Mr. Baraka Luvanda (Tanzania); Ms. Ikram Mohammed (Ethiopia); Mr. François-Xavier Ndoungou Ndjoum (Cameroon); Mr. Mani Ram Ojha (Nepal); Ms. Tatiana Pirvu (Moldova); Mr. Razvan Rotundu (Romania); Mr. Przemyslaw Saganek (Poland); Ms. Lola Saidova (Uzbekistan); Ms. Elizabeth Salmon (Peru); Mr. Tigran Samvelian (Armenia); Mr. Almami Taal (Gambia); Mr. N. Johnson Udombana (Nigeria); Mr. Santiago Urios Moliner (Spain); Ms. Gudrun Zagel (Austria). One additional selected candidate (from Democratic People's Republic of Korea) did not attend. A Selection Committee, under the Chairmanship of Professor Nguyen-Huu Tru (Honorary Professor, Graduate Institute of International Relations, Geneva), participants in the Seminar observed plenary meetings of the Commission, attended specially arranged lectures, and participated in working groups on specific topics.

655. The Seminar was opened by the Commission's Chairman, Mr. Zdzislaw Galicki. Mr. Ulrich von Blumenthal, Senior Legal Officer of the United Nations Office at Geneva, was responsible for the administration and organization of the Seminar.

656. The following lectures were given by members of the Commission: Mr. Victor Rodriguez-Cedeño: "Unilateral Acts of States"; Mr. Christopher Dugard: "Humanitarian Intervention"; Mr. Pemmaraju S. Rao: "International liability for injurious consequences arising out of acts not prohibited by international law"; Mr. Constantin Economides: "The obligation of peaceful settlement of international disputes under the UN Charter"; Mr. Emmanuel Addo: "Compatibility of reservations with the object and purpose of Multilateral Treaties"; Mr. Guillaume Pambou-Tchivounda: "Diplomatic Protection"; Mr. James Crawford: "State responsibility"; and Mr. Gerhard Hafner: "The International Criminal Court".

657. Lectures were also given by Mr. Vaclav Mikulka, Director, Codification Division, Office of Legal Affairs and Secretary to the International Law Commission: "The Work of the ILC"; Mr. Stéphane Jeannet, Legal Officer, International Committee of the Red Cross: "International Humanitarian Law and the Work of the ICRC"; Mr. Zdzislaw Kedzia, Office of the United Nations High Commissioner for Human Rights: "UNHCHR, Mandate, Activities, Tendencies"; and Judge Mayer Gabay, First Vice-President, United Nations Administrative Tribunal: "Internal justice at the UN".

658. Seminar participants were assigned to working groups whose main task consisted of preparing the discussions following each conference and of submitting written summary reports on each lecture. A collection of reports was compiled and distributed to the participants.

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met on 14 April 1999 and selected 24 candidates out of 74 applications for participation in the Seminar.

659. Participants were also given the opportunity to make use of the facilities of the United Nations Library and of the UNHCR Visitors' Centre, and to visit the Museum of the ICRC.

660. The Republic and Canton of Geneva offered its traditional hospitality to the participants with a guided visit of the Alabama and Grand Council Rooms.

661. Mr. Zdzislaw Galicki, Chairman of the Commission, Mr. Ulrich von Blumenthal, on behalf of the United Nations Office at Geneva, and Mr. Almami Taal, on behalf of the participants, addressed the Commission and the participants at the closing of the Seminar. Each participant was presented with a certificate attesting to his or her participation in the thirty-fifth session of the Seminar.

662. The Commission noted with particular appreciation that the Governments of Austria, Finland, Germany, Hungary, and Switzerland had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. The financial situation of the Fund allowed to award a sufficient number of fellowships to achieve adequate geographical distribution of participants and to bring from developing countries deserving candidates who would otherwise have been prevented from taking part in the session. This year, full fellowships (travel and subsistence allowance) were awarded to 12 candidates and partial fellowship (subsistence or travel only) to 8 candidates.

663. Of the 783 participants, representing 146 nationalities, who have taken part in the Seminar since 1965, the year of its inception, 443 have received a fellowship.

664. The Commission stresses the importance it attaches to the sessions of the Seminar, which enables young lawyers, especially those from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations which have their headquarters in Geneva. The Commission recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the holding of the Seminar in 2000 with as broad a participation as possible. It has to be emphasized that, due to the increasingly limited number of contributors, the organizers of the Seminar had to draw on the

reserve of the Fund this year. Should this situation continue, it is to be feared that the financial situation of the Fund will not allow the same amount of fellowships to be awarded in the future.

665. The Commission noted with satisfaction that in 1999 comprehensive interpretation services were made available to the Seminar. It expresses the hope that the same services will be provided for the Seminar at the next session, despite existing financial constraints.

Annex

REPORT OF THE WORKING GROUP ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

I. INTRODUCTION

1. At its 2569th meeting, on 7 May 1999, the Commission decided to establish a Working Group on Jurisdictional immunities of States and their property, which would be entrusted with the task of preparing preliminary comments as requested by operative paragraph 2 of General Assembly resolution 53/98 of 8 December 1998. It also decided to appoint Mr. G. Hafner as Chairman of the Working Group.

2. The Working Group was composed as follows: Mr. G. Hafner (Chairman), Mr. C. Yamada (Rapporteur), Mr. H. Al-Baharna, Mr. I. Brownlie, Mr. E. Candioti, Mr. J. Crawford, Mr. C. Dugard, Mr. N. Elaraby, Mr. G. Gaja, Mr. Q. He, Mr. M. Kamto, Mr. I. Lukashuk, Mr. T. Melescanu, Mr. P. Rao, Mr. B. Sepúlveda, Mr. P. Tomka and Mr. R. Rosenstock (ex officio).

3. The Working Group held 10 meetings between 1 June and 5 July 1999.

4. It had before it General Assembly resolution 53/98 of 8 December 1998, operative paragraphs 1 and 2 of which read as follows:

> "The General Assembly
>
> 1. Decides to establish at its fifty-fourth session an open-ended working group of the Sixth Committee open also to participation by States members of the specialized agencies, to consider outstanding substantive issues related to the draft articles on Jurisdictional immunities of States and their property adopted by the International Law Commission, taking into account the recent developments of State practice and legislation and any other factors related to this issue since the adoption of the draft articles, as well as the comments submitted by States in accordance with paragraph 2 of resolution 49/61 and paragraph 2 of resolution 52/151, and to consider whether there are any issues identified by the working group upon which it would be useful to seek further comments and recommendations of the Commission;
>
> 2. Invites the International Law Commission to present any preliminary comments it may have regarding outstanding substantive issues related to the draft articles by 31 August 1999, in the light of the results of the informal consultations held pursuant to

General Assembly decision 48/413 of 9 December 1993 and taking into account the recent developments of State practice and other factors related to this issue since the adoption of the draft articles, in order to facilitate the task of the working group.".

5. The Working Group also had before it the draft articles on the topic, submitted by the Commission to the General Assembly in 1991; document A/C.6/49/L.2, containing the conclusions of the Chairman of the informal consultations held in 1994 in the Sixth Committee of the General Assembly pursuant to the latter's decision 48/413; comments submitted by Governments, at the invitation of the General Assembly, on different occasions since 1991 (documents A/53/274 and Add.1; A/52/294; A/47/326 and Add.1 to 5; A/48/313; A/48/464 and A/C.6/48/3); the reports of two Working Groups established by the Sixth Committee of the General Assembly at its 47th (1992) and 48th (1993) sessions (documents A/C.6/47/L.10 and A/C.6/48/L.4, respectively); an informal document prepared by the Codification Division of the Office of Legal Affairs containing a summary of cases on jurisdictional immunities of States and their property occurring between 1991 and 1999 as well as a number of conclusions regarding those cases; an informal background paper as well as a number of memoranda prepared by the Working Group's Rapporteur, Mr. C. Yamada, on various issues related to the topic; the text of the 1972 European Convention on State Immunity; the resolution of "Contemporary problems concerning the immunity of States in relation to questions of jurisdiction and enforcement" adopted by the Institute of International Law at its 1991 Basel session; and the report of the International Committee on State Immunity of the International Law Association session held in Buenos Aires in 1994.

6. When considering possible approaches as to how to organize its work, the Working Group took particularly into account the wording of paragraph 2 of General Assembly resolution 53/98 which invited the Commission to present any preliminary comments it may have "regarding outstanding substantive issues related to the draft articles ... in the light of the results of the informal consultations held pursuant to General Assembly decision 48/413 of 9 December 1993".

7. It therefore decided to concentrate its work on the five main issues identified in the conclusions of the Chairman of the above-mentioned informal

consultations, as reflected in document A/C.6/49/L.2, namely: (1) Concept of a State for purposes of immunity; (2) Criteria for determining the commercial character of a contract or transaction; (3) Concept of a State enterprise or other entity in relation to commercial transactions; (4) Contracts of employment and (5) Measures of constraint against State property.

8. The paragraphs below contain the comments of the Working Group with regard to each of the above-mentioned issues. They include the provisions of the ILC draft relevant to each issue, an examination of how the issue has evolved, a summary of recent relevant case law, as well as the preliminary comments in the form of suggestions of the Working Group regarding possible ways of solving each issue and as a basis for further consideration. The suggestions often contain various possible technical alternatives, a final selection among which requires a decision by the General Assembly.

9. In addition, the report contains, as an appendix a short background paper on another possible issue which may be relevant for the topic of jurisdictional immunities, which was identified within the Working Group, stemming from recent practice. It concerns the question of the existence or non-existence of jurisdictional immunity in actions arising, inter alia, out of violations of jus cogens norms. Rather than taking up this question directly, the Working Group decided to bring it to the attention of the Sixth Committee.

II. COMMENTS AND SUGGESTIONS BY THE WORKING GROUP

A. CONCEPT OF STATE FOR PURPOSE OF IMMUNITY

1. Relevant provision of the ILC draft

10. The draft recommended by the Commission to the General Assembly in 1991 contains the following provision:

Article 2. Use of terms

1. For the purposes of the present articles:

...

(b) "State" means

(i) the State and its various organs of government;

(ii) constituent units of a federal State;

(iii) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;

(iv) agencies or instrumentalities of the State and other entities, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;

(v) representatives of the State acting in that capacity:

...

3. The provisions of paragraphs 1 and 2 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State.

2. How the issue has evolved

11. As may be seen from the above, paragraph 1 (b) (ii) of article 2 determines that "constituent units of federal States" fall within the definition of a "State" for the purposes of the draft articles. This provision has been the subject of controversy between federal States and non-federal States, particularly as regards the problem resulting from the potential dual capacity of constituent units to exercise governmental authority on behalf of the State or on their own behalf, pursuant to the distribution of public power between the State and its constituent units according to the relevant constitution. The discussions focused on the issue whether constituent units of federal States, through their inclusion in the notion of "State", should participate in the immunity of the State without any additional requirement, when they are acting on their own behalf and in their own name.

12. This provision did not exist in the draft articles adopted after the first reading in 1986. In 1986 and 1987 the General Assembly requested Governments to submit their comments on those draft articles. In 1988, one State commented that constituent units of federal States should be granted the same immunities as those of a central government, without any additional

requirement to establish sovereign authority. 1/ Another State commented that the whole draft did not contain any special provisions for federal States, unlike the European Convention on State Immunity of 1972. 2/

13. The Special Rapporteur, Motoo Ogiso, prepared his "Preliminary report on jurisdictional immunities of States and their property", 3/ which formed the basis for discussion on the topic during the fortieth session of the Commission in 1988. In response to comments on this issue, the Special Rapporteur stated during the session that he had no objection to including in the future convention a provision of that kind, but would like to have the Commission's opinion on the matter. 4/ During the forty-first session of the ILC in 1989, some members expressed the view that the constituent units of federal States should be included in the definition of the term "State". 5/ Draft article 2 (1) (b) (ii) as adopted on second reading, appeared for the first time in the Third Report as article 2 (1) (b) (i *bis*) which was related to the particular emphasis that the 1972 European Convention places on the constituent units of federal States. It was a proposal by the Special Rapporteur for consideration by the ILC. 6/ The

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1/ *Yearbook of the International Law Commission*, 1988, vol. II, Part one, p. 51; comments by Australia.

2/ Ibid., p. 70; comments by Federal Republic of Germany, then West Germany.

3/ For specific comments made by various Governments, ibid., p. 102.

4/ *Yearbook of the International Law Commission*, 1988, vol. I, p. 261. The same view was expressed in the ILC Report to the General Assembly (*Yearbook of the International Law Commission*, 1988, vol. II., p. 100).

5/ Mr. Tomuschat, *Yearbook of the International Law Commission*, 1989, vol. I, p. 142, para. 54, Mr. Barsegov, ibid., p. 148, para. 52, Mr. Al-Baharna, ibid., p. 166, para. 73. For the relevant section of the ILC Report on this issue, see *Yearbook of the International Law Commission*, 1989, vol. II, Part two, p. 100, para. 426.

6/ *Yearbook of the International Law Commission*, 1990, vol. I, p. 65, para. 4; vol. II, Part one, p. 8.

Commission, taking into account the views expressed by some of its members as well as by Governments, agreed to introduce this provision on second reading. 7/

14. In 1992, when various States submitted written comments on this draft article in response to a General Assembly resolution, the substance of this provision was not criticized. 8/ The Working Group established by the General Assembly within the framework of the Sixth Committee considered the written comments of Governments as well as views expressed in the debate at the forty-sixth session of the Assembly. Some Governments expressed the view that the provision was too sweeping and expressed sympathy with a proposal suggesting that a declaration by the central government be made a condition for granting sovereign immunity to constituent units of federal States. 9/ Taking into consideration the discussions in the Working Group and government comments, Mr. Carlos Calero-Rodrigues, the Chairman of the Working Group, suggested to insert the following words after "constituent units of a federal State":

> "... not covered by subparagraph (iii), provided that the federal State submit to the depositary of the present instrument a declaration signifying that they shall be entitled to invoke the immunity of the State".

This proposal, based on article 28 of the 1972 European Convention, sought to reconcile two different views on the provision. There were those in favour of maintaining an express reference to constituent units of federal States and those who thought that the wording adopted in the second reading was too sweeping and a potential source of uncertainty. 10/

7/ Yearbook of the International Law Commission, 1991, vol. II, Part II, p. 16, Mr. Ogiso's Commentary to the article noted that constituent units of some federal systems, for historical or other reasons, enjoyed sovereign immunity without the additional requirement that it be performing sovereign authority of the State.

8/ See comments by the Governments of Australia, Switzerland and the United States, A/47/326, pp. 3, 20 and 28 respectively.

9/ Outline of issues and comment, Working Group on the Convention on Jurisdictional Immunities of States and Their Property, 2nd meeting, 29 September 1992, p. 1; proposal by Switzerland.

10/ A/C.6/47/L.10, paras. 9 and 10.

15. The Working Group again considered this issue in 1993. The report of the Working Group noted that some national laws distributed public powers between the national Government and the constituent units. However, there remained a question as to whether constituent units enjoyed sovereign immunity to the same extent as a State in international law. 11/ Some thought that constituent units of federal States should be covered by article 2-1 (b) (iii) because in most cases they performed acts in the exercise of the governmental authority of the State. Therefore, article 2-1 (b) (ii) would only cover limited cases. In light of these views, the Chairman reformulated the proposal as follows:

> "constituent units of a federal State in cases not covered by subparagraph (iii), provided that the federal State has submitted to the depositary of the present instrument a declaration signifying that they are entitled to invoke the immunity of the State". 12/

16. In 1994, informal consultations were held. The issue whether constituent units of federal States should enjoy sovereign immunity without any additional requirement remained. The Chairman of the informal consultations, Mr. Calero-Rodrigues, thought that providing for the possible recognition of immunity for such units would promote broader participation in a convention. The Chairman proposed the following as a basis for a compromise on this issue:

> "The immunity of a constituent unit could be recognized on the basis of a declaration made by a federal State, as provided in article 28 of the European Convention on State Immunity. This approach would allow greater flexibility in light of the differences in the national laws of federal States while at the same time facilitating the application of the provisions by national courts by reducing uncertainties with respect to constituent units of federal States." 13/

11/ A/C.6/48/L.4, para. 17.

12/ Ibid., paras. 18 and 19.

13/ A/C.6/49/L.2, paras. 3 and 4.

17. The General Assembly again invited States to submit their comments on the conclusions of the Chairman of the informal consultations in 1994. 14/ In the view of one State, "constituent units of a federal State" and "political subdivisions of the State" did not appear to be clearly differentiated. According to that State "constituent units of a State" means those units which constitute an independent State and not federated States. It proposed that the phrase "constituent units" could be replaced by "autonomous territorial governmental entities", terminology used in the draft articles on State responsibility. 15/ Some States supported the compromise proposed by the Chairman. 16/ Another State commented that subparagraphs (ii) and (iii) were ambiguous. 17/

3. A summary of recent relevant case law

18. The following paragraph draws on a number of conclusions included in a summary of cases prepared by the Secretariat of the Commission, covering the period 1991-1999. 18/

14/ General Assembly resolution 49/61. The Secretary-General reiterated this invitation for comments in 1997.

15/ A/52/294, paras. 5-9; comment by Argentina.

16/ A/53/274, p. 2; A/52/274/Add.1, p. 2, para. 4; comments by Austria and Germany.

17/ Ibid., p. 4, para. 4.

18/ The following cases relevant to this issue were examined by the Secretariat in its summary: United Kingdom, House of Lords, 21 February 1991, Arab Monetary Fund v. Hashim and Others; United States, Court of Appeals, Ninth Circuit, 5 June 1991, Risk v. Halvorsen and Others (ILR 98, p. 125); United States, Court of Appeals, Second Circuit, 21 June 1991, Klinghoffer and Others v. SNC Achille Lauro and Others (ILR 96, p. 68); United States, Court of Appeals, Fifth Circuit, 11 June 1992, Arriba Limited v. Petroleos Mexicanos (ILR 103, p. 490); United States, Court of Appeals, Fifth Circuit, 8 July 1992, Walter Fuller Aircraft Sales Inc. v. Republic of the Philippines (ILR 103, p. 503); United States, Court of Appeals, 7th Circuit, 14 December 1992, Richard A. Week v. Cayman Islands (Lexis 32985); United States, District Court, Southern District of NY, 14 January 1993, Drexel Burnham Lambert Group Inc. v. Committee of Receivers for Galadari et al. Refco Inc. v. Galadari et al. (ILR 103, p. 532); United States, Court of Appeals, Second Circuit, 16 March 1993, Seetransport Wiking Trader Schiffahrtsgesellschaft MBH and Co., Kommanditgesellschaft v. Navimpex Centralia Navala (ILR 103, p. 559); United States, Court of Appeals, Second Circuit, 19 April 1993, Cargill International SA v. M/T Pavel Dybenko; Canada, Ontario Court of Appeal, 17 June 1993, Jaffe v. Miller and Others (ILR 95, p. 446); United States, Court of Appeals, Ninth Circuit,

19. Court decisions at the national level on this topic have emphasized the following indicators of a State: defined territory, permanent population, being under the control of its own government, and having the capacity to engage in formal relations with other States and to implement the obligations that normally accompany formal participation in the international community.

20. The characteristics of State instrumentalities and agencies that have been emphasized include: presumed independence from its sovereign and yet a linkage in the form of being an organ of a State or a political subdivision of a State or having a majority of its shares owned by the State or a political subdivision thereof, and the performance of functions traditionally performed by individual governmental agencies operating within their own national boundaries. In addition, it has been held that an instrumentality has a separate legal status, while there seems to be a difference of opinion as to whether an agent necessarily must have a separate legal personality. In determining whether an entity is a separate legal person, reference has been made to the need for an assessment of the core function of the entity and whether or not it is an integral part of a State's political structure or

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16 June 1994, In re Estate of Ferdinand Marcos Human Rights Litigation Hilao and Others v. Estate of Marcos (ILR 103, p. 52; ILR 104, p. 119); United States, Court of Appeals, District of Columbia Circuit, 19 July 1994, Transaero Inc. v. La Fuerza Aerea Boliviana (ILR 107, p. 308); United States, Court of Appeals, Fifth Circuit, 19 July 1994, Moran v. Kingdom of Saudi Arabia (ILR 107, p. 303); United States, District Court of Delaware, 3 August 1994, EAL (Delaware) Corp., Electra Aviation Inc. et al. v. European Organization for the safety of Air Navigation and English Civil Aviation Authority (ILR 107, p. 318); United States, Court of Appeals, Fifth Circuit, 17 October 1994, Gopalakrishnan N. Mangattu, Derryl F. Remedioa and Thaluthara K. Francis v. M/V IBN Hayyan, et al., United Arab Shipping Co.; Ireland, High Court, 22 November 1994, Schmidt v. Home Secretary of the Government of the UK, The Commissioner of the Metropolitan Police and Jones (ILR 103, p. 322); United States, Court of Appeals, 16 May 1995, Gates and Others v. Victor Fine Foods and others (ILR 107, p. 371); United States, Court of Appeals, Ninth Circuit, 22 May 1995, Export Group and Others v. Reef Industries Inc. and Mexican Coffee Institute (ILR 107, p. 393); United Kingdom, Employment Appeal Tribunal, 6 June 1995, Arab Republic of Egypt v. Gamal/Eldin (ILR 104, p. 673); United Kingdom, High Court, Chancery Division, 5 November 1996, Bank of Credit and Commerce International Ltd. v. Price Waterhouse and Others (ILR 111, p. 604); United Kingdom, Court of Appeal, 17 April 1997, Propend Finance PTY Limited and Others v. Sing and Others (ILR 111, p. 611); and United States Court of Appeals, Ninth Circuit, 23 April 1997, Nordmann v. Thai Airways Int'l Ltd. (Lexis 8646).

whether its structure and function was predominantly commercial. Entities closely bound up with the structure of the State, such as armed forces, tend to be regarded as the State itself rather than as a separate agency or instrumentality of the State. 19/ An entity created by a number of States to perform certain international functions has been held to have the same status as an agency or instrumentality of a foreign State performing the same functions. 20/

21. In terms of the burden of establishing or refuting immunity, the cases have found that an entity bears the onus of establishing that it falls within the definition of "State". If an entity establishes that it falls within the definition of State, then the burden is on the other party to show that an exemption to immunity might apply. If that burden is discharged, the burden then shifts to the entity to establish that the exceptions raised do not apply. 21/ The extent of the burden may differ across jurisdictions. For example, it may be, at least in some jurisdictions, that a plaintiff need only point to facts suggesting that an exception to immunity applies while the defendant bears the ultimate burden of proof of immunity. Alternatively, and this is the more likely scenario, the difference may be illusory and result from a difference of expression.

4. Suggestions of the Working Group

22. When examining this issue, the Working Group of the Commission also considered its possible relationship with the question, under State responsibility, of the attribution to the State of the conduct of other entities empowered to exercise elements of governmental authority. 22/

19/ United States, Court of Appeals, District of Columbia Circuit, 19 July 1994, Transaero Inc. v. La Fuerza Aerea Boliviana (ILR 107, p. 308).

20/ United States, District Court of Delaware, 3 August 1994, EAL (Delaware) Corp., Electra Aviation Inc. et al. v. European Organization for the safety of Air Navigation and English Civil Aviation Authority (ILR 107, p. 318).

21/ United States, District Court, Southern District of NY, 14 January 1993, Drexel Burnham Lambert Group Inc. v. Committee of Receivers for Galadari et al. Refco. Inc. v. Galadari et al. (ILR 103, p. 532).

22/ In 1971, when Special Rapporteur Ago presented his third report, he proposed an article on this issue, which read as follows: Article 7. Attribution to the State, as a subject of international law, of the acts of organs of public institutions separate from the State. The conduct of a person or group of persons having, under the internal legal order of a State, the status of an organ of a public corporation or other autonomous public

23. While some members of the Working Group felt that there should be a parallelism between the provision concerning the "concept of State for purpose of immunity" in the State immunity draft and the provision on "attribution to the State of the conduct of entities exercising elements of the governmental authority" in the State responsibility draft, other members felt that this was not necessarily the case. Although some members felt that it was not necessary to establish a full consistency between the two sets of draft articles, it was considered desirable to bring this draft article into line with the draft on State responsibility.

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institution or of a territorial public entity (municipality, province, region, canton, member state of a federal State, autonomous administration of a dependent territory, etc.), and acting in that capacity in the case in question, is also considered to be an act of the State in international law. (Yearbook of the International Law Commission, 1971, vol. II, Part one, p. 262.) In 1974, the International Law Commission discussed that article in several meetings [Yearbook of the International Law Commission, 1974, vol. I, pp. 5-16, 21-31 (1251st-1253rd meetings, 1255th-1257th meetings)]. As a result, the Commission adopted draft article 7 with commentaries. The text of the draft article reads as follows: Article 7. Attribution to the State of the conduct of other entities empowered to exercise elements of the governmental authority 1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question. 2. The conduct of an organ of an entity which is not a part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question. [Yearbook of the International Law Commission, 1974, vol. II, Part one, pp. 277-283.] The commentary states that if an act of an organ is to be regarded as an act of the State for purposes of international responsibility, the conduct of the organ of an entity of this kind must relate to a sector of activity in which the entity in question is entrusted with the exercise of the elements of governmental authority concerned. [Ibid., p. 282, para. (18)]. In 1998, the Drafting Committee of the Commission on State responsibility provisionally adopted another text for draft article 7, pursuant to the discussions in second reading. The text of the draft article reads as follows: Article 7. Attribution to the State of the conduct of entities exercising elements of the governmental authority. The conduct of an entity which is not an organ of the State under article 5 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the entity was acting in that capacity in the case in question [A/CN.4/L.569].

24. Furthermore, taking into account all the elements under the foregoing subsections, the Working Group agreed that the following suggestions could be forwarded to the General Assembly.

25. Paragraph 1 (b) (ii) of article 2 of the draft could be deleted and the element, "constituent units of a federal State" would join "political subdivisions of the State" in present paragraph 1 (b) (iii).

26. The qualifier "which are entitled to perform acts in the exercise of the sovereign authority of the State" could apply both to "constituent units of a federal State" and "political subdivisions of the State".

27. It was further suggested that the phrase "provided that it was established that that entity was acting in that capacity" could be added to the paragraph, for the time being, between brackets.

28. The Working Group also suggested that the expression "sovereign authority" in the qualifier should be replaced by the expression "governmental authority", to align it with the contemporary usage and the terminology used in the State responsibility draft.

29. The above suggestions seek to assuage the particular concern expressed by some States. It allows for the immunity of constituent units but, at the same time, addresses the concern of States which found the difference in treatment between constituent units of federal States and political subdivisions of the State confusing.

30. A reformulation of subparagraph (b) of paragraph 1 of article 2, for suggestion to the General Assembly, could thus read as follows:

> 1. For the purposes of the present articles:
>
> ...
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> (b) "State" means:
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> (i) the State and its various organs of government;
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> (ii) constituent units of a federal State and political subdivisions of the State, which are entitled to perform acts in the exercise of governmental authority, [provided that it was established that such entities were acting in that capacity];

(iii) agencies or instrumentalities of the State and other entities, to the extent that they are entitled to perform acts in the exercise of the governmental authority of the State;

(iv) representatives of the State acting in that capacity.

B. CRITERIA FOR DETERMINING THE COMMERCIAL CHARACTER OF A CONTRACT OR TRANSACTION

1. Relevant provision of the ILC draft

31. The draft recommended by the Commission to the General Assembly in 1991 contains the following provision:

Article 2. Use of terms

1. For the purposes of the present articles:

...

(c) "commercial transaction" means:

(i) any commercial contract or transaction for the sale of goods or supply of services;

(ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;

(iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. In determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if, in the practice of the State which is a party to it, that purpose is relevant to determining the non-commercial character of the contract or transaction.

3. The provisions of paragraphs 1 and 2 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State.

2. How the issue has evolved

32. The 1991 Commission's draft proceeded from the view that a State enjoys restrictive immunity, namely that jurisdictional immunity should not be

available when a State undertakes a commercial activity. Although agreement on this may, in principle, be reached, the restrictive approach raises as one of the main issues that of the definition of "commercial transactions" for the purpose of State immunity, and this has been a matter of controversy as well as disagreement. In this respect, some States consider that only the nature of the activity should be taken into account in determining whether it is commercial or not. Other States consider that the nature criterion alone does not always permit a court to reach a conclusion on whether an activity is commercial or not. Therefore, recourse must sometimes be made to the purpose criterion, which examines whether the act was undertaken with a commercial or a governmental purpose. Although several different proposals have been made as to how to integrate the two tests, no common solution has emerged from that practice. Paragraph 1 (c) and paragraph 2 of article 2 constitute an attempt to provide an integration of the two criteria but it has met so far with resistance in the Sixth Committee.

33. At the early stage of the Commission's work in this field, an increasing number of States was moving towards the restrictive theory while there was still a certain number of States which gave absolute immunity to foreign States. Therefore, the Commission had difficulties in finding a compromise between these two approaches. However, the Commission finally decided to draft the articles in accordance with the restrictive approach and completed its first reading in 1986. 23/

34. The comments submitted by Governments after the first reading could be categorized into three different attitudes towards the draft articles.24/ One State supported the concept of absolute immunity. 25/ Another State took

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23/ / Article 3 (2) of the 1986 draft read as follows: "In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract should also be taken into account if, in the practice of that State, that purpose is relevant to determining the non-commercial character of the contract."

24/ Document A/CN.4/410 and Add.1-5, Yearbook of the ILC, 1988, vol. II, Part 1, pp. 51 et seq.

25/ Brazil.

a positive view of the draft articles. 26/ One group of States objected to the inclusion of the purpose test in the definition of the commercial transactions. 27/

35. The second Special Rapporteur, Mr. Ogiso summarized the written comments and oral observations in the Sixth Committee and expressed his view in his preliminary report as follows: "With regard to paragraph 2, in the light of the fact that many countries support the nature criterion in determining whether a contract is commercial or not and criticize the purpose criterion, which in their view is less objective and more one-sided, the Special Rapporteur has no objection to deleting the purpose criterion. At the same time, it should be recalled that several Governments, both in their written comments and in their oral observations in the Sixth Committee, have supported the inclusion of the purpose criterion." 28/ In the same report, accepting the proposal made by some Governments to combine articles 2 and 3 of the first reading, he proposed a new text. 29/ The Special Rapporteur explained his view with regard to this reformulation as follows: "while he had no difficulty in eliminating the purpose test from the provision, leaving only the nature test, he was not sure whether such a course of action, though legally tenable, would not raise further difficulties in the Sixth Committee

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26/ Yugoslavia.

27/ Canada, Mexico, the five Nordic countries, Qatar, Spain and the United Kingdom.

28/ Paragraph 39, Preliminary report on jurisdictional immunities of States and their property by Mr. Motoo Ogiso, Document A/CN.4/415, Yearbook of the ILC, 1988, vol. II, Part 1, p. 102.

29/ Ibid., p. 101. The text read as follows: "In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but if an international agreement between the States concerned or a written contract between the parties stipulates that the contract is for the public governmental purpose, that purpose should be taken into account in determining the non-commercial character of the contract."

of the General Assembly. In his view, the best solution would be to reformulate the purpose test, as he had done in paragraph 3 of the new article 2." 30/

36. The Special Rapporteur's new proposal, which had been reflected in the Commission report, was discussed in the Sixth Committee. Some representatives expressed the view that in determining whether a contract was commercial, equal weight should be given to the nature of the contract and to its purpose. They stressed the importance of current international practice of the developing countries in particular, and the fact that they engaged in contractual transactions which were vital to the national economy or to disaster prevention and relief. If the purpose test was excluded and solely the nature test was applied, they added, such States would not be able to enjoy immunity even with regard to the activities in the exercise of their governmental functions. 31/ On the other hand, one of the representatives who insisted on the deletion of the purpose test expressed the view that the Commission should refrain from introducing subjective elements such as the "purpose" of a transaction in determining whether immunity might be claimed. He also suggested a compromise whereby, while the criterion for determining immunity should be the nature of the contract, the court of the forum State should be free to take a governmental purpose into account also, in the case of a commercial contract. 32/

37. After these discussions, although some of the representatives appreciated the proposal of the Special Rapporteur as a possible compromise, the view of the majority was that it was too rigid and should be improved on. 33/

38. The Special Rapporteur, taking into account a proposal made by one representative in the Sixth Committee, submitted another compromise in his

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30/ Report of the Commission to the General Assembly on the work of its fortieth session, para. 510, Yearbook of the ILC, 1988, vol. II, Part 2, p. 100.

31/ Para. 227, Topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-fourth session, A/CN.4/L.443, p. 67.

32/ Para. 228, ibid., p. 68.

33/ Para. 229, ibid.

third report in 1990. 34/ In this proposal, he intended to formulate the provision to the effect that, while the primary criterion for determining immunity should be the nature of the transaction, the court of a forum State should also be free to take a governmental purpose into account. He suggested that the necessity to take into account the public purpose of the transaction arose from the consideration to provide for the cases of famine or similar foreseen situations. He explained that it might be more advantageous, for purposes of flexibility, to give the power of discretion to the court of the forum State rather than to specify circumstances involved. 35/

39. In 1991, the Commission completed the second reading. As far as the definition and criteria of commercial transactions is concerned, the Commission adopted the provision on the basis of the basic approach proposed by the Special Rapporteur in his third report. 36/

40. After the text of the second reading by the Commission was sent to the Sixth Committee, the definition and criteria of commercial transactions continued to be one of the most controversial issues of these draft articles as is reflected in the comments submitted by Governments pursuant to resolutions 46/55, 49/61, and 52/151, respectively. The arguments were again raised in the Sixth Committee.

41. The comments submitted by Governments since 1992 37/ could be classified into two groups; one group welcomed the draft articles including the purpose test, 38/ and the other insisted that the nature test should be the sole criterion. For the States in the latter group, the purpose test could

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34/ The text read as follows: "In determining whether a transaction coming under paragraph 1 (c) of this article is commercial, reference should be made primarily to the nature of the transaction, but the courts of the forum State are not precluded from taking into account the governmental purpose of the transaction."

35/ Third report on jurisdictional immunities of States and their property, Yearbook of the ILC, 1990, vol. II, Part 1, pp. 7-8.

36/ Report of the Commission to the General Assembly on the work of its forty-third session, Yearbook of the ILC, 1991, vol. II, Part 2, p. 14 and pp. 19-21.

37/ A/47/32 and Add.1-5, A/48/313, A/48/464, A/C.6/48/3 and A/52/294.

38/ Brazil, France.

introduce subjective elements in the determination of commercial transactions broadening the sphere of the jure imperii in an unpredictable way. 39/

42. The Working Group established in 1992 in the Sixth Committee fully noted these comments of Governments and tried to find the way for a compromise. In the discussion of the Working Group, the Chairman proposed a reformulation combining subparagraphs (i) and (iii). 40/ It aimed at removing, at least in part, the element of circularity in the present definition of the expression "commercial transaction" and providing a non-exhaustive list of such transactions. He also suggested two alternatives of the paragraph 2 of article 2 in order to reconcile the concerns about the preference for the determination on the sole basis of nature and about the needs for predictability, on the one hand, and, on the other, the developing countries' attachment to the "purpose" test by requiring the State to specify in the contract or as part of the transaction, that it was reserving the possibility

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39/ Australia, Austria, United Kingdom, United States of America, Germany, Italy, Netherlands, Belgium and Bulgaria.

40/ The proposal read as follows: "The present subparagraphs (i) and (iii) are replaced by the following: (i) any contract or transaction of a commercial, industrial, [trading] or professional nature into which a State enters or in which it engages otherwise than in the exercise of the sovereign authority of the State, including a contract or transaction for the sale of goods or supply of services, but not including a contract of employment of persons. Alternatives for paragraph 2: 2. Notwithstanding the provisions of paragraph I (c), a contract or transaction shall not be considered commercial if the parties have so agreed when entering into the contract or transaction. 2. Notwithstanding the provisions of paragraph I (c), a court, in determining whether a contract or transaction is a 'commercial transaction', shall take into account the purpose of the contract or transaction if, at the time of its conclusion, the State which is a party to it has expressly reserved that possibility."

of having the purpose test applied. 41/ In addition to his own proposal, the Chairman introduced the proposal communicated to him by the Special Rapporteur of the Commission. 42/ None of these proposals could attain general consent. 43/

43. The Working Group established in the Sixth Committee in 1993 discussed this issue on the basis of the results of the previous year. With regard to the definition of "commercial transactions," the Chairman reformulated his proposal, which met with a wide measure of support. 44/ As far as the criteria for determination were concerned, the Working Group could not formulate general agreement, although a lot of proposals were submitted by the representatives. 45/

44. In the informal consultations held in 1994 pursuant to General Assembly decision 48/413, the arguments with regard to the criteria continued. The Chairman suggested a possible basis for a compromise. Its basic idea was to give States the option of indicating the potential relevance of the purpose criterion under their national law and practice either by means of a general declaration in relation to the convention or a specific notification to the

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41/ Paras. 13-16, Report of the Working Group, A/C.6/47/L.10, pp. 3 and 4.

42/ Para. 18, ibid., p. 4. The proposal read as follows: "2. In determining whether a contract or transaction is a 'commercial transaction' under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but in the exceptional circumstances where the contract or transaction is made for the purpose of humanitarian assistance including the procurement of food supplies to relieve a famine situation or the supply of medicaments to combat a spreading epidemic, such a contract or transaction may be regarded as 'non-commercial'."

43/ Paras. 17 and 19, ibid., pp. 4 and 11.

44/ Paras. 33-35, Report of the Working Group, A/C.6/48/L.4, pp. 6 and 7.

45/ Paras. 36-48, ibid., pp. 4-10.

other party by whatever means in relation to a particular contract or transaction, or a combination thereof in order to secure the required predictability. 46/

3. A summary of recent relevant case law

45. The practice in the municipal courts of States having a Statute or Act on immunity has, in general, determined the commercial character of an activity solely in accordance with its nature. 47/ Apart from the precedents in these States, there are precedents of determination pursuant to the nature test in Zimbabwe and in Malaysia. In Barker McCormac (Pvt) Ltd. v. Kenya, the Supreme Court of Zimbabwe explicitly supported the nature test. 48/ In Commonwealth of Australia v. Midford (Malaysia), the Supreme Court of Malaysia held that it determines the commercial character of the act in accordance with English common law and applied the nature test. 49/

46. On the other hand there are some precedents which support the purpose test. For example, in the Holy See v. Starbright Sales Enterprises Inc., the Supreme Court of Philippines took into account the intention of the purchase of land and denied the commercial character of the act in question. 50/ The

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46/ Para. 6, Informal consultations held pursuant to General Assembly decision 48/413, A/C.6/49/L.2, p. 3. The text of the basis for a compromise reads as follows: "A greater measure of certainty could be achieved by giving States the option of indicating the potential relevance of the purpose criterion under their national law and practice either by means of a general declaration in relation to the convention or a specific notification to the other party by whatever means in relation to a particular contract or transaction, or a combination thereof. This would clarify the situation not only for a private party who is so informed when entering into a contract or transaction with a State but also for a court which is called upon to apply the provisions of the convention."

47/ For example, A Limited v. B Bank and Bank of X, Court of Appeal, United Kingdom, 31 July 1996.

48/ Barker McCormac (Pvt) Ltd. v. Government of Kenya, Supreme Court, Zimbabwe, 22 July 1983, High Court, 16 January 1985, 84 ILR 18.

49/ Commonwealth of Australia v. Midford (Malaysia) Sdn Bhd and Another, Supreme Court, Malaysia, 9 February 1990, 86 ILR 640.

50/ The Holy See v. Starbright Sales Enterprises Inc., Supreme Court, Philippines, 1 December 1994, 102 ILR 163.

French courts have expressed the view that although the nature of the act should be considered primarily, the purpose of the act could be considered in certain cases as well. 51/

47. The following paragraphs draw on a number of conclusions included in a summary of cases prepared by the Secretariat of the Commission, covering the period 1991-1999. 52/

51/ For example, Société Euroéquipement v. Centre européen de la Caisse de stabilisation et de soutien des productions agricoles de la Côte d'Ivoire, Tribunal of Instance, Paris, France, 7 February 1991, commented by A. Mahiou in 118 JDI 406 (1991), and Sieur Mouracade v. Yemen, Court of Appeal, Paris, France, 20 February 1991, commented by A. Mahiou in 119 JDI 398 (1992).

52/ The following cases relevant to this issue were examined by the Secretariat: United States, Court of Appeals, Fifth Circuit, 11 February 1991, Stena Rederi AB v. Comission de Contratos del Comite Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana SC; United States, Court of Appeals, Second Circuit, 17 April 1991, Shapiro v. Republic of Bolivia and Others (ILR 98, p. 110); United States, Court of Appeals, Ninth Circuit, 19 April 1991, Schoenberg and Others v. Exportadora de Sal SA De CV (ILR 98, p. 118, Lexis 6724); United States, Court of Appeals, Seventh Circuit, 13 June 1991, Santos v. Compagnie Nationale Air France (ILR 98, p.131); United States, Court of Appeals, Fourth Circuit, 5 September 1991, Gerding and Others v. Republic of France and Others (ILR 98, p. 159); United States, Court of Appeals, Sixth Circuit, 22 October 1991, Gould Inc. v. Pechiney Ugine Kuhlmann and Trefimetaux (ILR 98, p. 137, Lexis 24913); United States, District Court, 4 October 1991, Fickling v. Commonwealth of Australia (ILR 103, p. 447); United States, Court of Appeals, Second Circuit, 28 October 1991, United States, Court of Appeals, Second Circuit, 21 July 1993, Antares Aircraft LP v. Federal Republic of Nigeria and Nigerian Airport Authority (ILR 107, p. 225); Australia, Supreme Court of Victoria, 17 February 1992, Reid v. Republic of Nauru (ILR 101, p. 193); Canada, Supreme Court, 21 May 1992, United States of America v. The Public Service Alliance of Canada and Others (ILR 94, p. 264); United States, Court of Appeals, Ninth Circuit, 22 May 1992, Siderman de Blake and Others v. The Republic of Argentina and Others (ILR 103, p. 454); United States, Court of Appeals, Fifth Circuit, 4 June 1992, United States v. Moats (ILR 103, p. 480); United States, Court of Appeals, Fifth Circuit, 11 June 1992, Arriba Limited v. Petroleos Mexicanos (ILR 103, p. 490); United States, Supreme Court, 12 June 1992, Republic of Argentina and Others v. Weltover Inc. and Others (ILR 100, p. 510); United States, Court of Appeals, Fifth Circuit, 8 July 1992, Walter Fuller Aircraft Sales Inc. v. Republic of the Philippines (ILR 103, p. 503); United States, Court of Appeals, Seventh Circuit, 14 December 1992, Richard A. Week v. Cayman Islands; United States, Supreme Court, 23 March 1993, Saudi Arabia and Others v. Nelson (ILR 100, p. 545); United Kingdom, Court of Appeal, 12 November 1993, Littrell v. United States of America (ILR 100, p. 438); United States, Court of Appeals, District of Columbia Circuit, 19 July 1994, Cicippio and Others v. Islamic Republic

48. Public, sovereign and governmental acts, which only a State could perform and which are core government functions, have been found not to be commercial acts. By contrast, acts that may be, and often are, performed by private actors and which are detached from any exercise of governmental authority are likely to be found to be commercial acts. One case has articulated those propositions in the form of a test, namely, whether the relevant act giving rise to the proceedings was of a private law character or came within the sphere of governmental activities. Another case 53/ has suggested that the "private person" test for sovereign immunity should be restricted to the trading context in which it was developed.

49. Many of the cases examined 54/ took the approach that the purpose of the activity is not relevant to determining the character of a contract or transaction and that it is the nature of the activity itself which is the decisive factor. Nevertheless, some cases under different national legal orders have emphasized that it is not always possible to determine whether a State was entitled to sovereign immunity by assessing the nature of the relevant act. This is because, it is said, the nature of the act may not

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of Iran (ILR 107, p. 297); United States, District Court of Delaware, 3 August 1994, EAL (Delaware) Corp., Electra Aviation Inc. et al. v. European Organization for the Safety of Air Navigation and English Civil Aviation Authority (ILR 107, p. 318); Ireland, High Court, 22 November 1994, Schmidt v. Home Secretary of the Government of the UK, The Commissioner of the Metropolitan Police and Jones (ILR 103, p. 322); New Zealand, Court of Appeal, 30 November 1994, Governor of Pitcairn and Associated Islands v. Sutton (ILR 104, p. 508); United States, Court of Appeals, District of Columbia Circuit, 20 January 1995, Janini v. Kuwait University (ILR 107, p. 367); United States, Court of Appeals, 16 May 1995, Gates and Others v. Victor Fine Foods and Others (ILR 107, p. 371); New Zealand, Court of Appeal, 16 February 1996, KPMG Peat Marwick and Others v. Davison/Controller and Auditor-General v. Davison Brannigan and Others v. Davison (ILR 104, p. 526); United States, Court of Appeals, Fifth Circuit, 18 March 1996, Brown v. Valmet-Appleton (Lexis 4875); United Kingdom, Court of Appeal, 31 July 1996, A Limited v. B Bank and Bank of X (ILR 111, p. 590); United States, Court of Appeals, Ninth Circuit, 23 April 1997, Nordmann v. Thai Airways Int'l Ltd. (Lexis 8646); and United States, Court of Appeals, District of Columbia Circuit, 28 October 1998, Atkinson v. Inter American Dev. Bank (Lexis 24915).

53/ Canada, Supreme Court, 21 May 1992, United States of America v. The Public Service Alliance of Canada and Others (ILR94, p. 264).

54/ Particularly those from United States courts in note 49 above.

easily be separated from the purpose of the act. In such circumstances, it has sometimes been held to be necessary to examine the motive of the act. Sometimes, even where motive and purpose are judged irrelevant to determining the commercial character of an activity, reference has been made to the context in which the activity took place. 55/

50. It is the nature of the activity which is relevant to the claim that is important, rather than the nature of other activities engaged in by the entity. Thus, it is not sufficient that the entity in issue engages in some form of commercial activity unrelated to the claim. In other words, there must be a nexus between the commercial activity and the cause of action. The cause of action has to arise out of the commercial transaction in a relevant way. The mere fact that an entity has engaged in commercial activity on other occasions does not mean that it cannot claim immunity in a given case.

51. In some States, the location of the activity is treated as important either because it is a separate requirement for jurisdiction or it is seen as relevant to the characterization of the transaction as commercial. In such case, the exception to immunity on the ground of commercial activity may not apply if there is no connection or nexus between the commercial activity and the State in whose courts the question is being considered. 56/

52. It may also be important to examine the activity in the context of all the relevant circumstances, for example, the entire course of conduct, to determine whether it is a sovereign or commercial activity. Thus the purchase of services may appear on its face to be a commercial activity but looked at in context it may be apparent that it is a non-commercial activity.

55/ See for instance Australia, Supreme Court of Victoria, 17 February 1992, Reid v. Republic of Nauru (ILR 101, p. 193).

56/ One case in a Canadian court, has posited the above requirement as a two stage enquiry, namely, an assessment of the nature of the activity, followed by an assessment of the relationship of the activity to domestic court proceedings. However, it was a case dealing with employment, which is being dealt with elswhere in the draft. See Canada, Supreme Court, 21 May 1992, United States of America v. The Public Service Alliance of Canada and Others (ILR 94, p. 264).

53. The activities of two governments dealing directly with each other as governments notwithstanding the fact that the subject matter relates to commercial activities of their citizens or government entities, have been held not to constitute commercial activities.

54. The following activities have been held to be "commercial activities": the issuance of debt, transporting of passengers for hire, conclusion of a contract of sale, negotiation and placating a majority shareholder, the lease of premises to conduct private business, 57/ the issuance of bills of exchange by a State owned bank as guarantee for construction of public works, 58/ the guarantee under the charterparty for the charter of a ship to a governmental corporation 59/ and the hiring of services from a private company for advice in the development of rural areas of a State. 60/

55. The following activities have been held not to have been "commercial activities": the acceptance of caveats, decisions to lift them, notification of the public, conduct of labour relations at a naval base, issuing currency, chartering of companies, regulation of companies, oversight of companies, the exercise of police powers, the imposition and collection of charges for air navigation services in national and international airspace, the power to seize property to collect a debt without prior judicial approval, implementing the general State policy of preserving law and order and keeping the peace, and keeping for disposal and actual disposal of one State's bank notes in another State.

57/ Tribunal d'Instance, Paris, 2nd district, 7 February 1991, Eurоéquipement v. Centre européen de la caisse de stabilisation et de soutien des productions agricoles de la Côte d'Ivoire and Another (ILR 1992, p. 37).

58/ France, Cour de Cassation, 18 novembre 1996, Cameroons development bank v. Société des établissements Robber (ILR 1988, p. 532).

59/ Auckland High Court Admiralty, New Zealand, Reef Shipping Co. Ltd., v. the Ship Fua Kavenga (ILR 1992, p. 556).

60/ United States, Court of Appeal, District of Columbia Circuit, 17 February 1997, Practical Concepts Inc., v. Republic of Bolivia (ILR 1993, p. 420).

4. Suggestions of the Working Group

56. After discussing the issue in the light of the foregoing elements, the Working Group agreed that the following suggestions could be forwarded to the General Assembly.

57. The issue concerning which criteria to apply for determining the commercial character of a contract or transaction arises only if the parties have not agreed on the application of a specific criterion, 61/ and the applicable legislation does not require otherwise.

58. The criteria contemplated in national legislation or applied by national courts offer some variety including, inter alia, the nature of the act, its purpose or motive as well as some other complementary criteria such as the location of the activity and the context of all the relevant circumstances of the act.

59. When considering this issue, the Working Group examines the following possible alternatives:

(a) The nature test as the sole criterion;

(b) The nature test as a primary criterion [second half of paragraph 2 of article 2 would be deleted];

(c) Primary emphasis on the nature test supplemented by the purpose test with a declaration of each State about its internal legal rules or policy; 62/

(d) Primary emphasis on the nature test supplemented by the purpose test;

(e) Primary emphasis on the nature test supplemented by the purpose test with some restrictions on the extent of "purpose" or with some enumeration of "purpose". 63/ Such restrictions or enumeration should be broader than a mere reference to some humanitarian grounds;

(f) Reference in article 2 only to "commercial contracts or transactions", without further explication;

61/ See footnote 40 above.

62/ Alternative suggested in document A/C.6/49/L.2, para. 6 (see note 46 above).

63/ See footnote 42 above.

(g) Adoption of the approach followed by the Institut de Droit International in its 1991 recommendations 64/ which are based on an enumeration of criteria and a balancing of principles, in order to define the competence of the court, in relation to jurisdictional immunity in a given case.

60. As a result of this examination, and in view of the differences of the facts of each case as well as the different legal traditions, the members of the Group felt that alternative (f) above, i.e. deletion of paragraph 2, was the most acceptable. It was felt that the distinction between the so-called nature and purpose tests might be less significant in practice than the long debate about it might imply. It was noted that some of the criteria contained in the draft article of the Institut de Droit International could serve as useful guidance to national courts and tribunals in determining whether immunity should be granted in specific instances.

C. CONCEPT OF A STATE ENTERPRISE OR OTHER ENTITY IN RELATION TO COMMERCIAL TRANSACTIONS

1. Relevant provisions of the ILC draft

61. The draft recommended by the Commission to the General Assembly in 1991 contained the following provisions:

> Article 10. Commercial transactions
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> ...
>
> 3. The immunity from jurisdiction enjoyed by a State shall not be affected with regard to a proceeding which relates to a commercial transaction engaged in by a State enterprise or other entity established by the State which has an independent legal personality and is capable of:
>
> (a) suing or being sued; and
>
> (b) acquiring, owning or possessing and disposing of property, including property which the State has authorized it to operate or manage.

2. How the issue has evolved

62. The draft articles adopted on first reading by the Commission did not contain any special provision with regard to State enterprises. The Commission started its consideration of this issue when the Second Special

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64/ For the text, see the appendix 2 below.

Rapporteur proposed article 11 bis in his preliminary report. He explained that the new proposal was formulated to take into account the general comments of certain States.65/ These States had suggested the inclusion of some provision with regard to the segregated State property, which was widely recognized in the socialist countries and meant that a State enterprise, as a legal entity, possessed a segregated part of national property.66/ In view of the primordial interest of the State in such enterprises, it was argued that the absence of immunity with respect to those enterprises could affect the immunity of the relevant State. In order to protect the latter, such a provision was thought necessary. By contrast, it was argued that because of the close linkage between the enterprise and the State, piercing of the veil of the juridical personality should be made possible so that the State could not use such enterprises in order to escape liability.

63. At the forty-first session in 1989, the Commission discussed the issue of the segregated State property on the basis of the proposal submitted by the Special Rapporteur in his preliminary report. The Special Rapporteur suggested that the purpose of this provision was not only to define the concept of segregated State property, but also to exempt foreign sovereign States from appearance before a court to invoke immunity in a proceeding concerning differences relating to a commercial contract between a State enterprise with segregated property and foreign persons.67/ Although many of

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65/ Byelorussian SSR and USSR. Para. 122, Preliminary report on jurisdictional immunities of States and their property, A/CN.4/415, Yearbook of the ILC, 1988, vol. II, Part 1, p. 109.

66/ For Byelorussian Soviet Socialist Republic, Comments and observations received from Government, A/CN.4/410 and Add.1-5, Yearbook of the ILC, vol. II, Part 1, para. 3, p. 60, and for the U.S.S.R., ibid., paras. 6 and 7, p. 83.

67/ 2115th meeting, para. 23, Summary records of the meetings of the forty-first session, Yearbook of the ILC, 1989, vol. II, Part 1, p. 138. The proposal read as follows: Article 11 bis: "If a State enterprise enters into a commercial contract on behalf of a State with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of another State, the former State cannot invoke immunity from jurisdiction in a proceeding arising out of that commercial contract unless the State enterprise, being a party to the contract on behalf of the State, with a right to possess and dispose of segregated State property, is subject to the same rules of liability relating to a commercial contract as a natural or juridical person."

the Commission's members recognized the significance of such provision, they could not reach a general agreement with regard to the formulation.

64. At the forty-fourth session of the General Assembly, in 1989, the issue of segregated property was discussed in the Sixth Committee. Some of the representatives supported it, suggesting that the article would provide for a necessary distinction, with regard to commercial contracts, between States and their independent entities, an important concept which deserved to be studied in detail. The remark was made that if applied coherently the concept could serve to limit abusive recourse to judicial proceedings brought against the State on the subject of commercial contract concluded by its public enterprises. One representative disagreed with this provision. He observed that State entities engaged in economic and trading activities, including corporations, enterprises or other entities having the capacity of independent juridical persons, did not in fact enjoy jurisdictional immunities under domestic or international law; while engaged in commercial activities in the forum State, those entities were subject to the same rules of liability in respect of commercial contracts and other civil matters as private individuals and juridical persons. In his opinion, to allow the liability of those State-owned entities to be attributed to the State itself would be tantamount to making a State a guarantor having unlimited liability for the acts of its entities. He also pointed out that the separation of States from their independent entities in terms of jurisdictional immunity was the concern of all countries. 68/ Other representatives considered that the concept of segregated State property required further clarification and expressed doubts as to whether it was necessary to have a special provision in the draft articles on the subject. One representative pointed out that although the real problem to be settled by this provision was the liability of a State in cases where a State enterprise had entered into a commercial contract, there were some possibilities to be dealt in these draft articles. 69/

68/ Topical Summary of the discussion held in the Sixth Committee of the General Assembly during its forty-fourth session, para. 241, A/CN.4/L.443, pp. 72-73.

69/ Ibid., para. 242, p. 73.

65. At the Commission's forty-second session in 1990, the Special Rapporteur submitted a new proposal 70/ for article 11 bis and the Commission discussed this issue. The main arguments fell into two groups: on the one hand, some members expressed the view that the question of State enterprises performing commercial transactions as separate and legally distinct entities from the State had a very wide application as it was highly relevant to developing countries and even to many developed countries. On the other hand, other members took the view that this provision was of limited application as the concept of segregated property was a specific feature of socialist States and should not be included in the draft articles. 71/

66. At the forty-third session in 1991, the Drafting Committee proposed a new formulation 72/ and the Commission adopted it. The features of this new formulation are as follows: firstly, the former article 11 bis was inserted into article 10 as the third paragraph and secondly, more general terms were used; in particular, the word "segregated" was deleted. 73/

67. In the Working Group established in 1992 by General Assembly resolution 46/55, the Chairman proposed a very different formulation which suggested the deletion of paragraph 3 of article 10 and the inclusion of a new provision. 74/ His proposal aimed at expressing in the clearest possible

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70/ Third report on jurisdictional immunities of States and their property, A/CN.4/431, Yearbook of the ILC, 1990, vol. II, Part 1, p. 13.

71/ Summary records of the meetings of the forty-second session, 2158th, 2159th, 2160th, 2161st, 2162nd and 2163rd meetings, Yearbook of the ILC, 1990, vol. I, pp. 78-94.

72/ Summary records of the meetings of the forty-third session, 2218th meeting, Yearbook of the ILC, vol. I, pp. 68-72.

73/ Report of the Commission to the General Assembly on the work of its forty third-session, Yearbook of the ILC, 1991, vol. II, Part 2, para. 11, pp. 35-36.

74/ The proposal referred to the elimination of article 10-3 and inclusion of the following new provision, possibly as paragraph 2 of article 5 or as a new article of Part V: "Jurisdiction shall not be exercised over a State and its property by the courts of another State in a proceeding, not related to acts performed in the exercise of sovereign authority, involving a State enterprise or other entity established by the State which: (a) has independent legal personality; (b) is capable of suing or being sued; and (c) is capable of owning, controlling, and disposing of property."

terms the distinction, for purposes of immunity, between the State and certain enterprises or entities established by the State and having an independent legal personality. Such a distinction would be recognized not only in respect of commercial transactions entered into by the enterprise but also in relation to any other activities of the enterprise, provided that the exercise of the sovereign authority of the State was not involved. 75/

68. His proposal did not address the question of under-capitalization of State enterprises, which had been raised by some delegations. For this purpose, the Chairman introduced a proposal from the Special Rapporteur of the Commission for the topic which he received after the conclusion of the debate. 76/ The purpose of this proposal was to give private companies the opportunity to "pierce the corporate veil" and to sue the State with respect to a transaction entered by its State enterprise. The Chairman supported the proposal and suggested that it seemed to be more acceptable to include a provision aimed at increasing the financial transparency of a State enterprise in order to avoid the possible objections from some delegations. 77/

69. In the Working Group established in 1993 by resolution 47/414, this issue continued to be discussed. With regard to the approach to be taken, there were two different views: one supported the approach of the draft articles of the ILC and the other sought to address the question either in Part II (General principles) or in a saving clause to appear in Part IV of the

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75/ Report of the Working Group, A/CN.6/47/L.10, paras. 31 and 32, pp. 6-7.

76/ The proposal envisages the addition of the following text either to paragraph 3 of article 10 or to the Chairman's proposal on paragraph 1 (b) (iv) of article 2: "Maintaining a proper balance sheet or financial record to which the other party to the transaction can have access in accordance with internal law of that State or the written contract."

77/ Ibid., paras. 33 and 34, p. 7.

draft. The Chairman submitted a proposal in accordance with the latter approach. 78/ Paragraph 2 was intended to replace paragraph 3 of article 10 and paragraph 3 would provide for the possible liability of the State as a guarantor of the State enterprise or other entity. 79/

70. The Working Group discussed the paragraphs of the proposal submitted by the Chairman respectively. With regard to paragraph 1, which was a reproduction of the ILC text without change, there were some suggestions about the wording. As far as paragraph 2 was concerned, although some delegations objected to it and some others reserved their views on the matter, the proposal was generally well received, subject to some observations. Various views were exchanged about the suitability and the implications of paragraph 3.

71. In the informal consultations held pursuant to General Assembly decision 48/413, the Chairman summarized the main issues and suggested a

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78/ The text read as follows: "Make the present text of article 5 into a paragraph 1 and insert two new paragraphs as follows: 2. Jurisdiction shall not be exercised over a State and its property by the courts of another State in respect of a commercial transaction engaged in by a State enterprise or another entity established by the State which: (a) has independent legal personality; (b) is capable of suing and being sued in its own name; and (c) is capable of acquiring, owning or possessing and disposing of property. 3. Paragraph 2 above is without prejudice to the consideration by the courts of the liability of the State as a guarantor of the liability of the State enterprise or other entity or of cases where the enterprise or entity engaged in a transaction as an authorized agent of the State."

79/ Report of the Working Group, A/C.6/48/L.4, and paras. 49 and 50, p. 10.

possible basis for a compromise. 80/ In their written comments, some members of the Commission supported the Chairman's basis for a compromise. 81/

3. A summary of recent relevant case law

72. The following paragraphs draw on a number of conclusions included in a summary of cases prepared by the Secretariat of the Commission, covering the period 1991-1999. 82/

80/ Informal consultations held pursuant to General Assembly decision 48/413, A/CN.6/49/L.2, paras. 7 and 8, pp. 3 and 4. The text for a basis of a compromise read as follows: "The scope of the provision of article 10, paragraph 3, could be clarified by indicating that the question of the liability of a State could arise in relation to a commercial transaction engaged in by a State enterprise or other entity established by that State where: (a) the State enterprise or other entity engages in a commercial transaction as an authorized agent of the State; (b) the State acts as a guarantor of a liability of the entity; or (c) the State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim."

81/ Replies received from States, A/53/274 and Add.1.

82/ The following cases relevant to this issue were examined by the Secretariat in its summary: United Kingdom, High Court, 9 July 1991, Re Rafidain Bank (ILR 101, p. 332); United States, Court of Appeals, Second Circuit, 28 October 1991; United States, Court of Appeals, Second Circuit, 21 July 1993, Antares Aircraft LP v. Federal Republic of Nigeria and Nigerian Airport Authority (ILR 107, p. 225); Australia, Supreme Court of Victoria, 17 February 1992, Reid v. Republic of Nauru (ILR 101, p. 193); United States, Court of Appeals, Ninth Circuit, 22 May 1992, Siderman de Blake and Others v. The Republic of Argentina and Others (ILR 103, p. 454); United States, Court of Appeals, Fifth Circuit, 4 June 1992, United States v. Moats (ILR 103, p. 480); United States, Court of Appeals, Fifth Circuit, 11 June 1992, Arriba Limited v. Petroleos Mexicanos (ILR 103, p. 490); United States, Court of Appeals, Fifth Circuit, 8 July 1992, Walter Fuller Aircraft Sales Inc. v. Republic of the Philippines (ILR 103, p. 503); United States, Court of Appeals, Seventh Circuit, 14 December 1992, Richard A. Week v. Cayman Islands (Lexis 32985); United States, Court of Appeals, Second Circuit, 16 March 1993, Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co, Kommanditgesellschaft v. Navimpex Centralia Navala (ILR 103, p. 559); United States, Supreme Court, 23 March 1993, Saudi Arabia and Others v. Nelson (ILR 100, p. 545); United States, Court of Appeals, Second Circuit, 19 April 1993, Cargill International SA v. M/T Pavel Dybenko; Canada, Court of Appeal for Ontario, 31 January 1994, Walker et al. v. Bank of New York Inc. (ILR 104, p. 277); United States, Court of Appeals, Ninth Circuit, 16 June 1994, In re Estate of Ferdinand Marcos Human Rights Litigation Hilao and Others v. Estate of Marcos (ILR 103, p. 52; ILR 104, p. 119); United States, Court of Appeals, 16 May 1995, Gates and Others v. Victor Fine Foods and others (ILR 107, p. 371); United States, Court of Appeals, Ninth Circuit, 23 April 1997, Nordmann v. Thai Airways Int'l Ltd (Lexis 8646); and

73. It appears that to be able to consider the acts of an entity as the acts of the instrumentality of a State it is necessary that there be a legal relationship between the State and the entity concerned. If no such relationship can be shown, it will not be possible to "pierce the veil" in order to reach the assets of the instrumentality.

74. A distinction has been drawn between a State entity entitled to sovereign immunity and an entity of the State functioning as an alter ego or agent of the Government for the purpose of liability. The latter has been held to require a more substantial relationship than that required for an entity to qualify as a State entity. 83/ There is a presumption that State instrumentalities retain their separate legal status and the plaintiff bears the burden of rebutting that presumption to establish that an agency relationship existed. 84/

75. A State has been found not to be able to claim immunity where it had taken rights in property in violation of international law and the property so taken was operated by an agency or instrumentality of that State engaged in commercial activities in another State. 85/

76. A bank and its employees that had participated in a bogus arms deal at the request of customs officers were found to be agents of a foreign State and therefore to be immune from suit notwithstanding the fact that the bank and its employees did not have an institutionalized relationship with that State. 86/

United States, Court of Appeals, District of Columbia Circuit, 28 October 1998, Atkinson v. Inter American Dev. Bank (Lexis 24915).

83/ United States, Court of Appeals, Fifth Circuit, 8 July 1992, Walter Fuller Aircraft Sales Inc. v. Republic of the Philippines (ILR 103, p. 503).

84/ United States, Court of Appeals, Fifth Circuit, 11 June 1992, Arriba Limited v. Petroleos Mexicanos (ILR 103, p. 490).

85/ United States, Court of Appeals, Ninth Circuit, 22 May 1992, Siderman de Blake and Others v. The Republic of Argentina and Others (ILR 103, p. 454).

86/ Canada, Court of Appeal for Ontario, 31 January 1994, Walker et al. v. Bank of New York Inc. (ILR 104, p. 277).

77. It has been held that persons acting outside their official capacities, without the authority of a foreign State, may be denied immunity on the basis of the fact that their acts are not those of an agency of the State. 87/

4. Suggestions of the Working Group

78. The Working Group discussed the issue in the light of the foregoing elements. It considered, in particular, the possible basis for a compromise contained on this issue in the report of the Chairman of the informal consultations held in the Sixth Committee in 1994. 88/

79. The Working Group concluded that the following suggestions could be forwarded to the General Assembly.

80. Paragraph 3 of article 10 could be clarified by indicating that the immunity of a State would not apply to liability claims in relation to a commercial transaction engaged in by a State enterprise or other entity established by that State where:

(a) the State enterprise or other entity engages in a commercial transaction as an authorized agent of the State;

(b) the State acts as a guarantor of a liability of the State enterprise or other entity.

This clarification could be achieved either by a characterization of the acts referred to in (a) and (b) as commercial acts or by a common understanding to this effect at the time of the adoption of this article.

81. The Working Group also considered the third ground for State liability suggested in the above-mentioned basis for a compromise, namely "where the State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim".

82. The Working Group considered that this suggestion went beyond the scope of article 10 and that it addressed a number of questions: immunity from jurisdiction, immunity from execution, and the question of the propriety of piercing the corporate veil of State entities in a special case. The

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87/ United States, Court of Appeals, Ninth Circuit, 16 June 1994, In re Estate of Ferdinand Marcos Human Rights Litigation Hilao and Others v. Estate of Marcos (ILR 103, p. 52; ILR 104, p. 119).

88/ Document A/C.6/49/L.2, para. 8; (see note 80 above).

Working Group also was of the view that this suggestion ignores the question whether the State entity, in so acting, acted on its own or on instructions from the State.

83. The Working Group was aware of the fact that the problem of piercing the corporate veil raises questions of a substantive nature and questions of immunity but it did not consider it appropriate to deal with them in the framework of its present mandate. Some stressed the importance of the draft dealing with the matter in an appropriate place.

D. CONTRACTS OF EMPLOYMENT

1. Relevant provision of the ILC draft

84. The draft recommended by the Commission to the General Assembly contains the following provision:

> Article 11. Contracts of employment
>
> (1) Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.
>
> (2) Paragraph 1 does not apply if:
>
> (a) the employee has been recruited to perform functions closely related to the exercise of governmental authority;
>
> (b) the subject of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;
>
> (c) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded;
>
> (d) the employee is a national of the employer State at the time when the proceeding is instituted; or
>
> (e) the employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject matter of the proceeding.

2. How the issue has evolved

85. Article 11 endeavors to maintain a delicate balance between the competing interests of the employer State with regard to the application of its laws, and the overriding interests of the State of the forum for the application of its labour laws, [89] in particular the need to protect the employee by offering him/her access to legal proceedings.

86. Article 11, paragraph 1 states the rule that States will not enjoy jurisdictional immunity for proceedings relating to local employment. Paragraph 2 lists the exceptions to the rule. Concern was expressed that the exceptions will undermine the rule. [90]

87. There remained divergent views on subparagraphs (a) and (c) of paragraph 2 in the informal consultations in 1994. As regards subparagraph (a), there was a question as to whether the phrase "closely connected to the exercise of the governmental authority" was sufficiently clear to facilitate its application by courts. With regard to subparagraph (c), it was suggested that this provision could not be reconciled with the principle of non-discrimination based on nationality. The Chairman proposed that further consideration could be given to the possibility of clarifying the phrase contained in subparagraph (a). He also proposed the deletion of subparagraph (c) in light of the principle of non-discrimination. [91]

88. As regards subparagraph (a) it should be pointed out that this exception was already contained in the draft articles adopted on first reading under the following wording:

> "(a) the employee has been recruited to perform services associated with the exercise of governmental authority;"

89. In 1988, Mr. Motoo Ogiso, the Special Rapporteur, stated in the preliminary report that he shared the fears expressed in written comments by

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[89] Commentary to article 11 (5).

[90] See document A/C.6/L.4, para. 62.

[91] A/C.6/49/L.2, p. 4, paras. 9 and 10. The basis for a compromise suggested by the Chairman read as follows: "Further consideration could be given to the possibility of clarifying the phrase contained in subparagraph (a) and to the deletion of subparagraph (c) in the light of the principle of non-discrimination."

Governments that subparagraph (a) as then worded could give rise to unduly wide interpretations, which could lead to confusion in the implementation of the future convention. He suggested its deletion. 92/ In 1989, he again expressed a similar view. 93/

90. The Special Rapporteur's suggestion to delete subparagraph (a) came in response to the opinion of some members of the Commission and Governments that the category of persons covered by that provision was too broad. However, the Special Rapporteur was of the view that subparagraph (a) was mainly intended to exclude administrative and technical staff of a diplomatic mission from the application of paragraph 1. Accordingly, he withdrew his proposal to delete subparagraph (a) and proposed an alternative text in 1990. The proposed text read:

> "(a) the employee is administrative or technical staff of a diplomatic or consular mission who is associated with the exercise of governmental authority;".

91. Some members of the Commission supported the Special Rapporteur's alternative text, whereas other members preferred either the deletion of the subparagraph or the general language of the text adopted on first reading.

92. In 1991, subparagraph (a) was adopted in its present form on second reading. The Commission on second reading considered that the expression "services associated with the exercise of governmental authority" adopted on first reading might lend itself to unduly extensive interpretation, since a contract of employment concluded by a State stood a good chance of being "associated with the exercise of governmental authority", even very indirectly. It was suggested that the exception in subparagraph (a) would only be justified if there were a close link between the work to be performed and the exercise of governmental authority. The word "associated" was therefore amended to read "closely related". In order to avoid any confusion with contracts for the performance of services which were dealt with in the

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92/ Yearbook of the International Law Commission, 1988, vol. II, Part one, p. 110, para. 132.

93/ Yearbook of the International Law Commission, 1989, vol. II, Part two, p. 110, para. 508.

definition of a "commercial transaction" and were therefore covered by article 10, the word "services" was replaced by the word "functions". 94/

93. Subparagraph (c) was also adopted in its present form on second reading in 1991. From 1988 to 1990 there was no discussion on whether this subparagraph would create a conflict with the principle of non-discrimination. 95/

94. The commentary states that this provision also favours the application of State immunity where the employee was neither a national nor a habitual resident of the State of the forum, the material time for either of these requirements being set at the conclusion of the contract of employment. This prevents potential litigants from changing either their nationality or to establish habitual or permanent residence in the State of the forum to defeat State immunity of the employer State. The protection of the State of the forum is confined essentially to the local labour force, comprising nationals of the State of the forum and non-nationals who habitually reside in that State. 96/

3. A summary of recent relevant case law

95. The following paragraphs draw on a number of conclusions included in a summary of cases prepared by the Secretariat of the Commission covering the period 1991-1999. 97/

94/ Yearbook of the International Law Commission, 1991, vol. II, Part two, p. 43, para. 9.

95/ Yearbook of the International Law Commission, 1988, vol. II, Part one, p. 110, para. 130; Yearbook of the International Law Commission, 1990, vol. II, Part two, p. 34, para. 183.

96/ Yearbook of the International Law Commission, 1991, vol. II, Part two, p. 44, para. 11.

97/ The following cases relevant to this issue were examined by the Secretariat in its summary: Ireland, High Court, 14 March 1991, Supreme Court, 12 March 1992, The Government of Canada v. The Employment Appeals Tribunal and Burke (ILR 95, p. 467); Netherlands, Supreme Court, 1991, M.K.B. van der Hulst v. USA (NYIL 1992, p. 379); Australia, Supreme Court of Victoria, 17 February 1992, Reid v. Republic of Nauru (ILR 101, p. 193); Netherlands, Sub-District Court of The Hague, 15 April 1992, M.H.C. v. The Republic of Cuba (NYIL 1996, p. 319); Canada, Supreme Court, 21 May 1992, United States of America v. The Public Service Alliance of Canada and Others (ILR 94, p. 264); United States, Court of Appeals, Fifth Circuit, 11 June 1992, Arriba Limited v. Petroleos Mexicanos (ILR 103, p. 490); Netherlands, Supreme Court, 2 March 1993, L.F.L.M. v. the Public Prosecutions Department (NYIL 1994, p. 527); Belgium, Court of Appeal of Brussels,

96. Although it has been argued that there are no universally accepted international law principles regulating the position of employees of foreign States, relevant case law has often considered a contract of employment as merely a special type of commercial/private law contract.

97. In this regard, it is important to distinguish between those States whose law on sovereign immunities make a specific provision for contracts of employment and those States where it does not or which have no statute on the subject. In the latter cases, it is necessary to analyse the contract of employment as a commercial or private law contract, whereas in the former case, the only question is whether the contract of employment falls within the relevant provisions.

98. A key concern has been to balance the sovereignty of States with the interests of justice involved when an individual enters into a transaction with a State. One way of achieving this balance has been to stress a distinction between acts that are sovereign, public or governmental in character as against acts that are commercial or private in character. In a case refusing to recognize a State's immunity, 98/ it was considered important

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10 March 1993, Rafidain Bank and Iraqi Ministry for Industry v. Consarc Corporation (ILR 106, p. 274); United States, Supreme Court, 23 March 1993, Saudi Arabia and Others v. Nelson (ILR 100, p. 545); Netherlands, District Court of Amsterdam, 26 May 1993, Republic of Italy v. B.V (NYIL 1995, p. 338); United Kingdom, Employment Appeal Tribunal, 17 November 1994, London Branch of the Nigerian Universities Commission v. Bastians (ILR 107, p. 613); New Zealand, Court of Appeal, 30 November 1994, Governor of Pitcairn and Associated Islands v. Sutton (ILR 104, p. 508); United Kingdom, Employment Appeal Tribunal, 14 December 1994 Jayetilleke v. High Commission of the Bahamas (ILR 107, p. 622); United Kingdom, Court of Appeal, 3 March 1995, Employment Appeal Tribunal, 10 July 1995, United Arab Emirates v. Abdelghafar and Another (ILR 104, p. 647); United Kingdom, Employment Appeal Tribunal, 6 June 1995, Arab Republic of Egypt v. Gamal/Eldin (ILR 104, p. 673); United Kingdom, Employment Appeal Tribunal, 8 October 1993, Court of Appeal Civil Division, 6 July 1995, Government of the Kingdom of Saudi Arabia v. Ahmed (ILR 104, p. 629); United States, Court of Appeals, District of Columbia Circuit, 20 January 1995, Janini v. Kuwait University (ILR 107, p. 367); United States, Court of Appeals, 16 May 1995, Gates and Others v. Victor Fine Foods and others (ILR 107, p. 371); and United States, Court of Appeals, Fifth Circuit, 18 March 1996, Brown v. Valmet-Appleton (Lexis 4875).

98/ Australia, Supreme Court of Victoria, 17 February 1992, Reid v. Republic of Nauru (ILR 101, p. 193).

that the tasks performed by an employee of a foreign State's airline were the same as those of a commercial pilot and detached from any exercise of sovereign power. In another case, 99/ it was considered important in recognizing sovereign immunity that an employee's employment was performed in administrative and clerical support of sovereign functions.

99. Immunity has generally been granted in respect of the employment of persons at diplomatic or consular posts whose work involves the exercise of governmental authority.

100. The cases examined indicate a tendency for courts to find that they have the jurisdiction to hear disputes relating to employment contracts, where the employment mirrors employment in the private sector. However, there has also been recognition that some employment based on such contracts involve governmental activities by the employees and, in such circumstances, courts have been prepared to grant immunity.

101. Nevertheless, the Working Group noted that under article 11, (2) (b) a foreign State does enjoy immunity in cases concerning contract of employment where the subject of the proceeding is recruitment, renewal or reinstatement. But the immunity does not exclude jurisdiction for unpaid salaries or, in certain cases, damages for dismissal.

102. The Working Group noted that there was a distinction between the rights and duties of individual employees and questions of the general policy of employment, 100/ which essentially concern management issues of the employing State.

4. Suggestions of the Working Group

103. After discussing the issue in the light of the foregoing elements, the Working Group agreed that the following suggestions could be forwarded to the General Assembly.

104. As regards subparagraph (a) of paragraph 2 of article 11, the Working Group provisionally agreed that in the expression "perform functions closely

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99/ New Zealand, Court of Appeal, 30 November 1994, Governor of Pitcairn and Associated Islands v. Sutton (ILR 104, p. 508).

100/ See, in particular, the following cases: Italian Trade Union for Embassy and Consular Staff v. United States, 1981, 65 ILR, p. 338; and United States of America v. The Public Service of Canada and Others, ILR 94, p. 264.

related to the exercise of governmental authority", the words "closely related to" could be deleted in order to restrict the scope of the subparagraph to "persons performing functions in the exercise of governmental authority".

105. The Working Group also agreed that the subparagraph could be further clarified by stating clearly that paragraph 1 of article 11 would not apply if the employee has been recruited to perform functions in the exercise of governmental authority", in particular:

- Diplomatic staff and consular officers, as defined in the 1961 Vienna Convention on diplomatic relations and the 1963 Vienna Convention on consular relations, respectively.
- Diplomatic staff of permanent missions to international organizations and of special missions.
- Other persons enjoying diplomatic immunity, such as persons recruited to represent a State in international conferences.

106. As regards subparagraph (c) of paragraph 2 of article 11, the Working Group agreed to recommend to the General Assembly that it would be advisable to delete it, as it could not be reconciled with the principle of non-discrimination based on nationality. This deletion, however, should not prejudge on the possible inadmissibility of the claim on grounds other than State immunity, such as, for instance, the lack of jurisdiction of the forum State. In this respect, the Working Group notes a possible uncertainty in paragraph 1 of article 11 as regards, for example, the meaning of the words "in part".

107. The Working Group noted that it may be desirable to reflect explicitly in article 11, the distinction referred to in paragraph 102 above.

E. MEASURES OF CONSTRAINT AGAINST STATE PROPERTY

1. Relevant provisions of the ILC draft

108. The draft recommended by the Commission to the General Assembly in 1991 contains the following provisions:

> Article 18. State immunity from measures of constraint
>
> 1. No measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) the State has expressly consented to the taking of such measures as indicated:

  - (i) by international agreement;
  - (ii) by an arbitration agreement or in a written contract; or
  - (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen;

(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or

(c) the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory the State of the forum and has a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed.

2. Consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint under paragraph 1, for which separate consent shall be necessary.

Article 19. Specific categories of property

1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under paragraph 1 (c) of article 18:

(a) property, including any bank account, which is used or intended for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences;

(b) property of a military character or used or intended for use for military purposes;

(c) property of the central bank or other monetary authority of the State;

(d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;

(e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.

2. Paragraph 1 is without prejudice to paragraph 1 (a) and (b) of article 18.

2. How the issue has evolved

109. The draft articles adopted in 1991 make a clear distinction between immunity from jurisdiction and immunity from measures of constraint. They proceed from the principle that no measures of constraint may be taken and thus, also provide for certain exceptions to that principle.

110. On first reading the Commission adopted three articles: article 21 (State immunity from measures of constraint), article 22 (consent to measures of constraint) and article 23 (specific categories of property).101/ With

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101/ Yearbook of the International Law Commission, 1986, vol. 2, para. 2, Report of the Commission at its thirty-eight session (A/38/10). The text on first reading read as follows: Article 21 State immunity from measures of constraint: A State enjoys immunity, in connection with a proceeding before a court of another State, from measures of constraints, including any measure of attachment, arrest and execution, on the use of its property or property in its possession or control [, or property in which it has a legally protected interest,] unless the property, (a) is specifically in use or intended for use by the State for commercial [non-governmental] purposes and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed; or (b) has been allocated or earmarked by the State for the satisfaction of the claim which is the object of that proceeding.

Article 22 Consent to measures of constraint: 1. A State cannot invoke immunity, in connection with a proceeding before a court of another State, from measures of constraint on the use of its property or property in its possession or control [, or property in which it has a legally protected interest,] if and to the extent that it has expressly consented to the taking of such measures in respect of that property, as indicated: (a) by international agreement; (b) in a written contract; or (c) by a declaration before the court in a specific case. 2. Consent to the exercise of jurisdiction under article 8 shall not be held to imply consent to the taking of measures of constraint under Part IV of the present articles, for which separate consent shall be necessary.

Article 23 Specific categories of property: 1. The following categories of property of a State shall not be considered as property specifically in use or intended for use by the State for commercial [non-governmental] purposes under subparagraph (a) of article 21: (a) property, including any bank account, which is in the territory of another State and is not used or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to regard to article 21, the comments of Governments could be classified into two different groups: one suggested the necessity to clarify the scope of the provision and to avoid unnecessary limitation on the cases in which property might legitimately be subject to measures of constraint 102/ and the other insisted on the importance of the principle of State immunity from measures of constraint. 103/ Compared with the other two provisions, fewer States submitted comments on article 22. 104/ With regard to article 23, the comments of Governments focused on the further clarification of the meaning of each paragraph and subparagraph. 105/ On the basis of the review of the comments of Governments the Special Rapporteur suggested some amendments both

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organs of international organizations or to international conferences; (b) property of a military character or used or intended for use for military purposes; (c) property of the central bank or other monetary authority of the State which is in the territory of another State; (d) property forming part of the cultural heritage of the State or part of its archives which is in the territory of another State and not placed or intended to be placed on sale; (e) property forming part of an exhibition of objects of scientific or historical interest which is in the territory of another State and not placed or intended to be placed on sale. 2. A category of property, or part thereof, listed in paragraph 1 shall not be subject to measures of constraint in connection with a proceeding before a court of another State, unless the State in question has allocated or earmarked that property within the meaning of subparagraph (b) of article 21, or has specifically consented to the taking of measures of constraint in respect of that category of its property, or part thereof, under article 22.

102/ The comments of the following Governments could be considered as belonging to this group: United Kingdom, Federal Republic of Germany (then), Belgium, five Nordic countries, Australia, Canada, Qatar and Switzerland, paras. 211-213, Preliminary report on jurisdictional immunities of States and their property, A/CN.4/415, Yearbook of the ILC, 1988, vol. II, Part 1, p. 117.

103/ The German Democratic Republic, Byelorussian SSR and USSR commented from this viewpoint, para. 216, ibid., p. 117.

104/ Paras. 222-225, ibid., p. 118.

105/ Paras. 228-237, ibid., pp. 118-119.

in his preliminary as well as in his second but did not change the fundamental structure of the relevant articles.106/ There still remained the criticism against the text of the first reading.

111. In his third report the Special Rapporteur proposed two alternatives for the second reading. Whereas the first one was the text as adopted on first reading, the second suggested its reformulation.107/ He explained that, in

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106/ Para. 240, Preliminary report on jurisdictional immunities of States and their property, A/CN.4/415, Yearbook of the ILC, 1988, vol. II, Part 1, p. 119 and para. 46, Second report on jurisdictional immunities of States and their property, A/CN.4/422 and Add.1, Yearbook of the ILC, 1989, vol. II, Part 1, p. 73. For the text, see Annex III.

107/ Third report on jurisdictional immunities of States and their property, A/CN.4/431, Yearbook of the ILC, 1990, vol. II, Part 1, pp. 18-19. The text read as follows: First Alternative: Text as adopted in the first reading; Second alternative: Article 21 State immunity from measures of constraint: 1. No measures of constraint, including measures of attachment, arrest and execution, against the property of a foreign State may be taken in the territory of a forum State unless and to the extent that: (a) the foreign State has expressly consented to the taking of such measures in respect of that property, as indicated: (i) by arbitration agreement; (ii) by international agreement or in a written contract; (iii) by a written consent given after a dispute between the parties has arisen; or (b) the foreign State has allocated or earmarked its property for the satisfaction of the claim which is the object of that proceeding; or (c) the property is in the territory of the forum State and is specifically in use or intended for use by the State for commercial [non-governmental] purposes [and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed].

2. Consent to the exercise of jurisdiction under article 8 shall not be held to imply consent to the taking of measures of constraint under Part IV of the present articles, for which separate consent shall be necessary.

Article 22: The following categories of property of a State shall not be considered as property specifically in use or intended for use by the State for commercial purposes under paragraph 1 (c) of article 21: (a) property, including any bank account, which is in the territory of another State and is used or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences; (b) property of a military character or used or intended for use for military purposes; (c) property of the central bank or other monetary authority of the foreign State which is in the territory of a forum State and used for monetary purposes; (d) property forming part of the cultural heritage of the State or part of its archives which is in the territory of another State and not placed or intended to be placed on sale; (e) property forming part of an exhibition of objects of scientific or historical interest which is in the territory of another State and not placed or intended to be placed on sale.

the light of the comments received from Governments and of the observations made in the Sixth Committee and in the Commission, carefully limited execution rather than its total prohibition would have a better chance of obtaining general approval. 108/ He also added a new provision with regard to State enterprises. 109/

112. Members of the Commission generally supported the basic approach of the second alternative, including the idea of combining articles 21 and 22. 110/ However, they expressed different views with regard to the substance of the new article 21. One of the two main issues discussed in particular was the proposed deletion of the bracketed phrase "or property in which it has a legally protected interest", which appeared in the introductory clause of article 21 and in paragraph 1 of article 22 as adopted on first reading. 111/ The other one on which the views of members were divided concerned the possible deletion of the bracketed phrase "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed" in paragraph 1 (c) of the new article 21. With regard to new article 22 proposed by the Special Rapporteur, many members

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2. A category of property, or part thereof, listed in paragraph 1 shall not be subject to measures of constraint in connection with a proceeding before a court of a forum State, unless the State in question has specifically consented to the taking of measures of constraint in respect of that category of its property, or part thereof, under paragraph 1 (a) of article 21, or allocated or earmarked that property within the meaning of paragraph 1 (b) of article 21.

Article 23: If a State property including a segregated State property is entrusted by the State to a State enterprise for commercial purposes, the State cannot invoke immunity from a measure of constraint before a court of a forum State in respect of that State property.

108/ Para. 5, ibid., p. 19.

109/ Para. 9, ibid., para. 9, p. 20.

110/ Report of the International Law Commission on the work of its forty-second session, para. 222, Yearbook of the ILC, 1990, vol. II, Part 2, p. 42.

111/ Para. 223, ibid.

supported the addition of the words "and used for monetary purposes" in paragraph 1 (c). 112/ As far as new article 23 was concerned, the majority of members were of the view that it was probably unnecessary, but that the Commission should await the final results of its work concerning the definition of the term "State" in the new article 2 and the ultimate fate of draft article 11 bis. The members considered that a State enterprise established for commercial purposes, not being a State as defined in the new article 2, was not entitled to perform acts pursuant to the governmental authority of the State and that it fell outside the scope of the topic of jurisdictional immunities of States and the new article 23 should therefore not be included in the draft. 113/

113. At its forty-third session in 1991, the Commission completed the second reading. With regard to the execution, it adopted the articles 21 and 22 proposed by the Special Rapporteur in 1990 as new articles 18 and 19, respectively. 114/

114. In their written comments several States insisted on the need for further examining article 18. Some comments mentioned the importance of the distinction between "prejudgement or interim measures" and "measures of execution"; other comments were related to the possibility of the enforcement of a judgment in a third State; still other comments suggested the need for the provision to establish the obligation of a State to satisfy a judgment rendered against it. 115/ As far as article 19 was concerned, most comments of Governments called for the refinement and further clarification of the categories of property, particularly paragraphs 1 (a) and (c). 116/

115. In the Working Group established pursuant to resolution 46/55 of the General Assembly, the issue of execution was discussed further. With regard to article 18, the following points were raised for discussion: first, the

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112/ Para. 227, ibid.

113/ Para. 228, ibid.

114/ Report of the ILC on the work of its forty-third session, Yearbook of the ILC, 1991, vol. II, Part 2, pp. 56-59.

115/ For the comments from Governments, A/47/326 and Add. 1-5, A/48/313, A/48/464 and A/C.6/48/3.

116/ United Kingdom, Italy.

requirement of the connection between the property and the claim or the agency or instrumentality concerned; secondly, the obligation of a State to satisfy the judgment; thirdly the necessity of the phrase "intended for use" and finally the absence of a provision with regard to an under-capitalized State agency or instrumentality. As far as article 19 was concerned, questions were raised as to the implications of some subparagraphs, particularly, the extent covered by the term "bank account" (para. 1 (a)) and the meaning of the term "monetary authority" (para. 1 (c)). Some members expressed their doubt about the need for article 19 while, in the view of others, that article was necessary as it reinforced the protection enjoyed by certain types of State property and avoided any misunderstanding regarding the immunity of such property. 117/ The Chairman suggested that the provision with regard to the obligation of a State to satisfy the judgement against it might have provided a basis for compromise. After these discussions, the Chairman suggested new proposals in relation to article 18. 118/

116. On the basis of the proposals for article 18 submitted by the Chairman of the Working Group in 1992, the members continued their discussion in the Working Group established in 1993 pursuant to resolution and the Chairman suggested an amendment of the proposed new paragraph in the Group. Notwithstanding an extensive discussion, they could not achieve a compromise with regard to any of the proposals. 119/ As far as article 19 was concerned, the issue of its appropriateness was again raised. The members also exchanged views about the meaning of each subparagraph. 120/

117. In the informal consultations held pursuant to General Assembly decision 48/413, the issue of measures of constraint was further discussed. They could not formulate a compromise and the Chairman identified the issues as follows:

117/ Report of the Working Group, A/C.6/47/L.10, pp. 11-14.

118/ Paras. 21-24, ibid., pp. 4-5.

119/ Paras. 67-80, Report of the Working Group, A/C.6/48/L.4, pp. 13-15. The text of the Chairman's proposal read as follows: "No measures of constraint shall be taken against the property of a State before that State is given adequate opportunity to comply with the judgement."

120/ Paras. 81 and 82, ibid., p. 15.

> "In general, there are different views as to whether the exercise of jurisdiction by a court in proceedings to determine the merits of a claim against a foreign State implies the power to take measures of constraint against the property of that State with a view to satisfying a valid judgement confirming the claim. If such a power is recognized, there are also different views as to which property may be subject to measures of constraint. Any attempt to reconcile the different views on these issues would need to take into account the interests of a State in minimizing the interference with its activities resulting from coercive measures taken against its property as well as the interests of a private party in obtaining satisfaction of a claim against a foreign State that has been confirmed by an authoritative judicial pronouncement." 121/

118. He also suggested a possible basis for a compromise which read as follows:

> "12. Given the complexity of this issue, it was not possible to achieve general agreement on the basis for a compromise in the limited time available. The informal consultations indicated that it may be necessary to consider several elements in attempting to find a generally acceptable compromise, with the following elements being identified for further consideration. First, it may be possible to lessen the need for measures of constraint by placing greater emphasis on voluntary compliance by a State with a valid judgement. This may be achieved by providing the State with complete discretion to determine the property to be used to satisfy the judgement as well as a reasonable period for making the necessary arrangements. Second, it may be useful to envisage international dispute settlement procedures to resolve questions relating to the interpretation or application of the convention which may obviate the need to satisfy a judgement owing to its invalidity. As a consequence of the first two elements, the power of a court to take measures of constraint would be limited to situations in which the State failed to provide satisfaction or to initiate dispute settlement procedures within a reasonable period. Since the State would be given

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121/ Document A/C.6/49/L.2, para. 11.

> complete discretion to determine the property to be used to satisfy a valid judgement and a reasonable period to do so, the court would have the power to take measures of constraint against any of the State's property located in the forum State which was not used for government non-commercial purposes once the grace period had expired."
>
> "13. As regards prejudgement measures, the emphasis on voluntary compliance by a State with an eventual judgement, together with the possibility of measures of constraint, would also lessen the need for such precautionary measures, which could be eliminated or possibly restricted to property belonging to State agencies, instrumentalities or other entities in proceedings instituted against them rather than the State or its organs. Thus, the requisite connection could be maintained with respect to prejudgement measures, which would only be permitted in proceedings against a State agency, instrumentality or other entity." 122/

3. A summary of recent relevant case law

119. The following paragraphs draw on a number of conclusions included in a summary of cases prepared by the Secretariat of the Commission covering the period 1991-1999. 123/

120. The cases examined appear to fall into two categories which may reflect different circumstances rather than a discernible difference in approach. The

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122/ Ibid., paras. 12 and 13.

123/ The following cases relevant to this issue were examined by the Secretariat in its summary: United States, Court of Appeals, Fifth Circuit, 11 February 1991, Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana SC; Italy, Constitutional Court, 15 July 1992, Condor and Filvem v. Minister of Justice (ILR 101, p. 394); United States, District Court, Southern District of New York, 6 July 1992, Foxworth v. Permanent Mission of the Republic of Uganda to the United Nations (ILR 99, p. 138); United States, Court of Appeals, Second Circuit, 4 March 1993, 767 Third Avenue Associates and Another v. Permanent Mission of the Republic of Zaire to the United Nations (ILR 99, p. 195); Netherlands, Supreme Court, 28 May 1993, The Russian Federation v. Pied-Rich B.V (NYIL 1994, p. 512); Belgium, Civil Court of Brussels, 27 February 1995, Iraq v. Dumez (ILR 106, p. 284); Belgium, Civil Court of Brussels, 9 March 1995, Zaire v. D'Hoop and Another (ILR 106, p. 294); and Netherlands, Rotterdam District Court, 18 April 1996, P.C. van der Linden v. The Government of the United States of America (Dept. of the Navy) (NYIL 1997, p. 344).

crucial issue appears to be the nature of the State property in issue and whether it is needed or destined specifically for the fulfilment of sovereign functions.

121. The first category consists of a range of cases 124/ in which requests for various orders in relation to foreign State property have been refused or overturned on the basis of a variety of legal arguments including arguments on the basis of provisions in the United Nations Charter, the United Nations-United States Headquarters Agreement and the Vienna Convention that require, for example, the premises of missions to be inviolable, and missions and representatives of United Nations Member States to be given the facilities and legal protection necessary for the performance of their diplomatic functions. An important factor in such cases appears to have been that the State in whose courts the matter is being considered and the State whose property is in issue have agreed on the interpretation to be given to such agreements. A further relevant and related factor may be a concern to maintain the reciprocity of recognition of diplomatic privileges and immunities of diplomats.

122. In the second category and perhaps tending in a different direction are comments made in one case 125/ to the effect that:

- the immunity of foreign States from attachment and execution in the forum State was not simply an extension of immunity from jurisdiction;
- the absolute character of immunity from execution has been increasingly rejected over the last 30 years;
- there is no longer a rule of customary international law absolutely precluding coercive measures against the property of foreign States;
- it is now broadly accepted that execution against the property of foreign States could not be excluded as a matter of principle;

124/ See cases in United States courts listed in note 123 above.

125/ Italy, Constitutional Court, 15 July 1992, Condor and Filvem v. Minister of Justice (ILR 101, p. 394).

- the scope of such immunity remained wider than immunity from jurisdiction, which did not apply to activities performed *jure gestionis*;
- in order for immunity from attachment and execution to apply, it was necessary not only that the activity or transaction at issue was performed *jure gestionis* but also that the property affected was not destined for the fulfilment of sovereign functions;
- the foreign policy interest of the executive in preserving good relations with other States no longer justified a rule of absolute immunity from attachment and execution where the property was not destined specifically for the fulfilment of sovereign functions;
- if the executive wished to avoid possible embarrassment it remained possible for it to intervene in the proceedings to offer to pay off a creditor seeking enforcement against the property of a foreign State or to guarantee payment of a debt in return for the creditor's withdrawal of a request for attachment against such property.

123. Other cases seem to fall within this second category. For example, in a case, 126/ a court rejected a State's claim of immunity from execution and found that there was no unwritten rule of international law to the effect that seizure of a vessel belonging to a State and intended for commercial shipping is permissible in only limited circumstances. In another case 127/ a State was found not entitled to jurisdictional immunity or immunity from execution on the basis that it had acted as an ordinary private person and because it had been deprived of its prerogative as a sovereign State as a result of Security Council resolutions. That case reiterated that under international law, States were not entitled to absolute immunity from execution, that such immunity only applied to certain assets and that it was necessary to determine whether the funds subjected to attachment had been allocated in whole or part

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126/ Netherlands, Supreme Court, 28 May 1993, The Russian Federation v. Pied-Rich B.V (NYIL 1994, p. 512).

127/ Belgium, Civil Court of Brussels, 27 February 1995, Iraq v. Dumez (ILR 106, p. 284).

for sovereign activities. Another case from the same court contains similar comments, finding that there was power to examine assets belonging to a State to determine their nature. 128/

124. The two categories of cases referred to in the above paragraphs do not necessarily indicate a difference of approach. Courts are consistently unwilling to allow measures of constraint to be taken against the property of a State which is destined specifically for the fulfilment of sovereign functions. In addition, the first category of cases appears to be governed by provisions in international conventions and other documents which provide States with certain rights and obligations vis-à-vis other States while the second category of cases appears to be determined in the absence of any such provisions.

4. Suggestions of the Working Group

125. After examining the issue in the light of all the elements above, the Working Group agreed that the following suggestions could be forwarded to the General Assembly.

126. The Working Group concluded that a distinction between prejudgement and post-judgement measures of constraint may help sort out the difficulties inherent in this issue. It was however stressed that both types of measures are subject to the conditions of article 19 [property for governmental non-commercial purposes].

127. As regards prejudgement measures of constraint, the Working Group was of the view that these should be possible [only] in the following cases:

(a) Measures on which the State has expressly consented either ad hoc or in advance;.

(b) Measures on property designated to satisfy the claim;

(c) Measures available under internationally accepted provisions [leges specialis] such as, for instance, ship arrest, under the International Convention relating to the arrest of seagoing ships, Brussels, 24 February 1956;

(d) Measures involving property of an agency enjoying separate legal personality if it is the respondant of the claim.

128/ Belgium, Civil Court of Brussels, 9 March 1995, Zaire v. D'Hoop and Another (ILR 106, p. 294).

128. As regards post-judgement measures, the Working Group was of the view that these should be possible [only] in the following cases:

(a) Measures on which the State has expressly consented either ad hoc or in advance;

(b) Measures on designated property to satisfy the claim.

129. Beyond this, the Working Group has explored three possible alternatives which the Assembly may decide to follow:

Alternative I

(i) Granting the State a 2-3 months grace period to comply with it as well as freedom to determine property for execution;

(ii) If no compliance occurs during the grace period, property of the State, [subject to article 19] could be subject to execution.

Alternative II

(i) Granting the State a 2-3 months grace period to comply with it as well as freedom to determine property for execution;

(ii) If no compliance occurs during the grace period, the claimis brought into the field of inter-State dispute settlement; this would imply the initiation of dispute-settlement procedures in connection with the specific issue of execution of the claim.

Alternative III

The Assembly may decide not to deal with this aspect of the draft, because of the delicate and complex aspects of the issues involved. The matter would then be left to State practice on which there are different views. The title of the topic and of the draft would be amended accordingly.

APPENDIX TO THE REPORT OF THE WORKING GROUP

1. In resolution 53/98, the General Assembly invited the International Law Commission to present comments on outstanding substantive issues relating to the draft articles on Jurisdictional Immunities of States and their Property taking into account the recent developments of State practice and other factors related to this issue since the adoption of the draft articles.

2. It appears that resolution 53/98 seeks only to obtain the comments of the ILC on recent developments of State practice in relation to the issues considered in document A/C.6/49/L.2 (informal consultations held pursuant to General Assembly decision 48/413).

3. On the other hand there has been an additional recent development in State practice and legislation on the subject of immunities of States since the adoption of the draft articles which the ILC considers necessary to draw to the attention of the Sixth Committee. This development concerns the argument increasingly put forward that immunity should be denied in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of jus cogens, particularly the prohibition on torture.

4. In the past decade, a number of civil claims have been brought in municipal courts, particularly in the United States and United Kingdom, against foreign Governments, arising out of acts of torture committed not in the territory of the forum State but in the territory of the defendant and other States. 129/

5. In support of these claims plaintiffs have argued that States are not entitled to plead immunity where there has been a violation of human rights norms with the character of jus cogens.

6. National courts, in some cases, 130/ have shown some sympathy for this argument.

129/ See: J. Bröhmer State Immunity and Violation of Human Rights (1997); Report of International Law Association Committee on State Immunity (1994).

130/ See: (United Kingdom) Al-Adsani v. Government of Kuwait 100 ILR 465 at 471; (New Zealand) Controller and Auditor General v. Sir Ronald Davidson [1996] 2 NZLR 278, particularly at 290 (per Cooke P.); Dissenting Opinion of Justice Wald in (United States) Princz v. Federal Republic of Germany 26 F 3d 1166 (DC Cir. 1994) at 1176-1185.

7. However, in most cases, 131/ the plea of sovereign immunity has succeeded.

8. Since these decisions were handed down, two important developments have occurred which give further support to the argument that a State may not plead immunity in respect of gross human rights violations.

9. First, the United States has amended its Foreign Sovereign Immunity Act (FSIA) to include a new exception to immunity. This exception, introduced by section 221 of the Anti-Terrorism and Effective Death Penalty Act of 1996, provides that immunity will not be available in any case:

> "in which money damages are sought against a foreign State for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage-taking ...".

A Court will decline to hear a claim if the foreign State has not been designated by the Secretary of State as a State sponsor of terrorism under federal legislation or if the claimant or victim was not a national of the United States when the act occurred.

10. This provision has been applied in two cases. 132/

11. Secondly, the Pinochet case has emphasized the limits of immunity in respect of gross human rights violations by State officials. 133/

12. Although the judgement of the House of Lords in that case only holds that a former head of State is not entitled to immunity in respect of acts of torture committed in his own State and expressly states that it does not affect the correctness of decisions upholding the plea of sovereign immunity in respect of civil claims, as it was concerned with a criminal prosecution, there can be no doubt that this case, and the widespread publicity it

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131/ See: (United States) Siderman de Blake v. Republic of Argentina 965 F 2d 699 (9th Cir. 1992); (United States) Argentine Republic v. Amerada Hess Shipping Corporation 488 US 428 (1989); (United States) Saudi Arabia v. Nelson 100 ILR 544; (United States) Princz v. Federal Republic of Germany 26 F 3d 1166 (DC Cir. 1994); (United Kingdom) Al-Adsani v. Kuwait 107 ILR 536.

132/ See: (United States) Rein v. Libya (1999) 38 ILM 447; (United States) Cicippio v. Iran 18 F 2d 62 (1998).

133/ See: (United Kingdom) R v. Bow Street Metropolitan Stipendiary Magistrate: Ex Parte Pinochet Ugarte (No. 3) [1999] 2 WLR 827 (HL).

received, has generated support for the view that State officials should not be entitled to plead immunity for acts of torture committed in their own territories in both civil and criminal actions.

13. The developments examined in this appendix are not specifically dealt with in the draft articles on Jurisdictional Immunities of States and their Property. Nevertheless they are a recent development relating to immunity which should not be ignored.

Note to the report of the Working Group

Article 2 of the 1991 draft of the Institut de Droit International 134/ reads as follows:

Article 2

Criteria indicating the Competence of Courts or other Relevant Organs of the Forum State in relation to Jurisdictional Immunity:

1. In determining the question of the competence of the relevant organs of the forum State, each case is to be separately characterized in the light of the relevant facts and the relevant criteria, both of competence and incompetence; no presumption is to be applied concerning the priority of either group of criteria.

2. In the absence of agreement to the contrary, the following criteria are indicative of the competence of the relevant organs of the forum State to determine the substance of the claim, notwithstanding a claim to jurisdictional immunity by a foreign State which is a party:

(a) The organs of the forum State are competent in respect of proceedings relating to a commercial transaction to which a foreign State (or its agent) is a party;

(b) The organs of the forum State are competent in respect of proceedings concerning legal disputes arising from relationships of a private law character to which a foreign State (or its agent) is a party; the class of relationships referred to includes (but is not confined to) the following legal categories: commercial contracts; contracts for the supply of services, loans and financing arrangements; guarantees or indemnities in respect of financial obligations; ownership, possession and use of property; the protection of industrial and intellectual property; the legal incidents attaching to incorporated bodies, unincorporated bodies and associations, and partnerships; actions in rem against ships and cargoes; and bills of exchange;

(c) The organs of the forum State are competent in respect of proceedings concerning contracts of employment and contracts for professional services to which a foreign State (or its agent) is a party;

(d) The organs of the forum State are competent in respect of proceedings concerning legal disputes arising from relationships which are not

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134/ See paras. 59 and 60 above.

classified in the forum as having a "private law character" but which nevertheless are based upon elements of good faith and reliance (legal security) within the context of the local law;

(e) The organs of the forum State are competent in respect of proceedings concerning the death of, or personal injury to, a person, or loss or damage to tangible property which are attributable to activities of a foreign State and its agents within the national jurisdiction of the forum State;

(f) The organs of the forum State are competent in respect of proceedings relating to any interest of a foreign State in movable or immovable property, being a right or interest arising by way of succession, gift or bona vacantia; or a right or interest in the administration of property forming part of the estate of a deceased person or a person of unsound mind or a bankrupt; or a right or interest in the administration of property of a company in the event of its dissolution or winding up; or a right or interest in the administration of trust property or property otherwise held on a fiduciary basis;

(g) The organs of the forum State are competent insofar as it has a supervisory jurisdiction in respect of an agreement to arbitrate between a foreign State and a natural or juridical person;

(h) The organs of the forum State are competent in respect of transactions in relation to which the reasonable interference is that the parties did not intend that the settlement of disputes would be on the basis of a diplomatic claim;

(i) The organs of the forum State are competent in respect of proceedings relating to fiscal liabilities, income tax, customs duties, stamp duty, registration fees, and similar impositions provided that such liabilities are the normal concomitant of commercial and other legal relationships in the context of the local legal system.

3. In the absence of agreement to the contrary, the following criteria are indicative of the incompetence of the organs of the forum State to determine the substance of the claim, in a case where the jurisdictional immunity of a foreign State party is in issue:

(a) The relation between the subject-matter of the dispute and the validity of the transactions of the defendant State in terms of public international law;

(b) The relation between the subject-matter of the dispute and the validity of the internal administrative and legislative acts of the defendant State in terms of public international law;

(c) The organs of the forum State should not assume competence in respect of issues the resolution of which has been allocated to another remedial context;

(d) The organs of the forum State should not assume competence to inquire into the content or implementation of the foreign defence and security policies of the defendant State;

(e) The organs of the forum State should not assume competence in respect of the validity, meaning and implementation of intergovernmental agreement or decision creating agencies, institutions or funds subject to the rules of public international law.

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